BEFORE THE
BOARD OF PSYCHOLOGIST EXAMINERS
STATE OF OREGON

In the Matter of:	)	Agency Case No. 2009-035, 2010-007
	)	
DAVID T. BICE, Ph.D.	)	**FINAL ORDER ON REMAND**
	)	
Licensee.	)	

HISTORY OF THE CASE

The Board of Psychologist Examiners (Board) issued its Final Order on this case on September 28, 2012. In the Order, the Board imposed terms of discipline.[1] Licensee filed a petition for judicial review with the Court of Appeals on November 27, 2012. This case was argued and submitted on March 17, 2015. The Court of Appeals issued its opinion on October 19, 2016, *Bice v. Bd of Psychologist Examiners*, 281 Or. App. 623 (2016). The Court issued its Appellate Judgment on May 10, 2017.

In its opinion, the Oregon Court of Appeals reversed a number of the Board's findings of fact and remanded the Board's Final Order, stating: "Having found that several historical facts are not as found by the board, we must remand for the board to reconsider, under a correct understanding of the facts, its conclusions that petitioner violated ORS 675.070(2)(d) (unprofessional conduct), Ethical Standard 2.01 (boundaries of competence), Ethical Standard 3.04 (avoiding harm), and Ethical Standard 10.01 (informed consent) in his treatment of SM." *Id.* at 638. On March 23, 2017, the Court denied Licensee's petition for the award of attorney fees ($71,990) and costs ($856.50). In that opinion, the Court stated: "...although we determined that certain historical facts were not as found by the board, we cannot conclude that the board acted unreasonably in making the findings that it did."

Accordingly, the Board has reviewed the Final Order and the Court's Opinion to reconsider under the facts as determined by the Court of Appeals whether Licensee violated the statute or any Ethical Standard, as identified by the Court, and if so, to determine the appropriate sanction. Having conducted this review, the Board now issues this Final Order upon Remand.

DISCUSSION

In its opinion, the Court of Appeals found that Licensee did not attempt to kiss SM on the lips, but did find that Licensee gave "...SM a kiss on the cheek goodbye at the end of their last

[1] The Final Order states: "Licensee is reprimanded. Licensee must successfully complete coursework pre-approved by the Board's designee on informed consent, charting, and the use of touch during therapy. In addition, Licensee must practice for a minimum of one year under the supervision of a licensed psychologist pre-approved by the Board's designee, with monthly written reports provided to the Board. During this time, Licensee must revise his informed consent form with the assistance and approval of his supervisor, and submit his revised informed consent form to the Board for review and comment. At the end of one year, Licensee may, with the written endorsement of the supervisor, submit a written request to terminate the requirement to practice under supervision."

session based on SM's contemporaneous accounts to her mother and in her diary." *Id.* at 632. Based upon this finding of fact, the Board concludes by a preponderance of the evidence that Licensee's conduct violated ORS 675.070(2)(d)(A) immoral or unprofessional conduct and Ethical Standard 3.04 (avoiding harm), by engaging in conduct that violated recognized standards of ethics of the psychological profession and constituted a danger to the client SM by failing to take reasonable steps to avoid harming his client and to minimize harm where it is foreseeable and unavoidable. The Board bases its conclusions on the historical facts determined by the Court of Appeals, which included SM's contemporaneous accounts to her mother and her diary entry, which reflected that SM had an adverse reaction to Bice's conduct towards her and wrote in her diary shortly thereafter that she found Bice "was way too creepy for me." (Exhibit A37.) Licensee could have prevented this adverse reaction by maintaining appropriate boundaries by refraining from kissing SM on the cheek in a private clinical setting. SM's statement to the Board's Investigator that she would never have a male counselor again (Exhibit A14 at 2) is another indicator that SM suffered harm from Licensee's goodbye kiss at the end of the last clinical session. The Board views such conduct in a one on one clinical setting between a psychologist and his 17 year old female client as a *per se* violation of ES 3.04 (avoiding harm). Licensee held a position of disparate power and authority relative to SM and initiated a kiss, a form of physical contact that was fraught with the potential for harm. This conduct also violated ORS 675.070(2)(d)(A) (immoral or unprofessional conduct), in that this conduct violated a recognized standard of ethics and constituted a danger to the health or safety of SM by causing her distress.

REASSESSING THE SANCTION UPON REMAND

Based upon the findings of fact provided by the Court of Appeals and the Board's conclusions of law that Licensee violated ES 3.04 (avoiding harm) and ORS 675.070(2)(d)(A) (immoral or unprofessional conduct), the Board has reconsidered the sanction set forth in its original Final Order and determines that the Board's sanctions set forth in the original Final Order, to include supervision and the specified coursework, are not commensurate with the conclusions of law in this Order. Therefore, the Board now issues the following order:

ORDER

The Board sets aside the portion of the Board's Final Order that required Licensee to complete the specified coursework, to revise his informed consent form, and directed that Licensee practice under the supervision of a licensed psychologist preapproved by the Board's designee. The Board affirms the following sanction: Licensee is reprimanded

DATED this 26th day of May, 2017.

BOARD OF PSYCHOLOGIST EXAMINERS
State of Oregon

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Clifford Johannsen, Ph.D.
Board Chair

APPEAL

If you wish to appeal the Final Order on Remand, you must file a petition for review with the Oregon Court of Appeals within 60 days after the Final Order on Remand is served upon you. *See* ORS 183.482.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

David T. BICE, Ph.D.,
Petitioner,

v.

BOARD OF PSYCHOLOGIST EXAMINERS,
Respondent.

Board of Psychologist Examiners
2009035, 2010007; A153028

Argued and submitted March 17, 2015.

Steven J. Sherlag argued the cause and filed the briefs for petitioner.

Carolyn Alexander, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Prall, Judge pro tempore.*

ARMSTRONG, P. J.

Reversed and remanded.

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* Hadlock, C. J., *vice* Nakamoto, J. pro tempore.

ARMSTRONG, P. J.

Petitioner, a psychologist, seeks judicial review of a final order of the Board of Psychologist Examiners in which the board concluded that petitioner had violated professional standards in his treatment of one of his clients and imposed sanctions. We first reject without discussion petitioner's challenge to the denial of his motion to dismiss based on investigatory misconduct. In his remaining assignments of error, petitioner principally argues that the board erred in modifying key findings of historical fact made by the administrative law judge (ALJ). On *de novo* review of the record under ORS 183.650(4), and as explained in detail below, we find that key disputed historical facts are not as found by the board. Because we must remand to the board for reconsideration and entry of an order consistent with our findings on those disputed historical facts, ORS 183.650(4), we do not reach petitioner's assignments of error related to the board's application of the professional standards to his conduct.

A detailed discussion of the allegations against petitioner and the evidence presented at the contested case hearing would be of no value to the bench, bar, parties, or public. Thus, except as supplemented below in our analysis, we only briefly set out the background facts here, which are taken from the board's findings that petitioner does not dispute, as supplemented by uncontroverted evidence in the record.

Petitioner has been licensed as a psychologist in Oregon since 1975 and has not previously been subject to disciplinary action by the board. In August and September 2003, SM, an 18-year-old woman,[1] saw petitioner as a client for seven sessions. SM had decided to stop seeing her prior therapist because she did not like the advice she was receiving and began seeing petitioner, who had been her father's therapist, to help her process her grief over her father's sudden death, before she left the state for college. SM's mother filed a complaint against petitioner shortly after SM stopped treating with him based on allegations that petitioner had behaved in a manner that made SM uncomfortable,

[1] SM turned 18 the day after her first session with petitioner.

"indicating that [petitioner's] behavior with SM was personal and physical without being overtly sexual." The board dismissed that complaint because SM told her mother that she did not want to pursue the complaint herself and did not sign a release for her records. The board, which it now admits was in violation of its own rules, deliberately decided not to notify petitioner about the complaint or the dismissal.

In 2009, the father of SC, a female client of petitioner, filed a complaint against petitioner based on two birthday cards and a high school graduation card petitioner had sent to SC, when SC was still a minor. SC did not provide a release of her medical records for the investigation. In an interview, SC stated that petitioner had never acted inappropriately toward her and called her father's complaint an attempt at "emotional revenge" by her father who "wanted control" and was opposed to SC seeking therapy.

In addition, the board's investigator, Berry, contacted another of petitioner's female clients, DC, after DC's father filed a complaint about petitioner's billings. Berry told DC that her call had nothing to do with DC's father and told DC that "several young women" had come forward accusing petitioner of inappropriate conduct. DC told Berry that petitioner was never inappropriate with her, but, in the course of the conversation, became very uncomfortable because Berry was being manipulative, kept trying to take her comments out of context, and insinuated that petitioner had done something wrong. As a result, DC filed a complaint with the board against Berry, which the board declined to pursue. Berry admitted that she had tried to press DC into saying that petitioner had acted inappropriately toward DC.[2]

In 2010, the board reopened the complaint involving SM because SC's father had filed his complaint. At that time, SM agreed to cooperate in an investigation against petitioner at the urging of Berry and her mother after Berry told her and her mother that the board had received a complaint involving a "similar situation." The board pursued

[2] Unlike the board, we consider Berry's investigation in relation to DC relevant to our assessment of the evidence in undertaking our *de novo* review under ORS 183.650(4).

this disciplinary action against petitioner based on the allegations relating to SM and SC.

A contested case hearing was held before the ALJ in November 2011. During that hearing, 14 witnesses testified, including petitioner, SM, SM's mother, SC's father, Berry, colleagues of petitioner, and expert witnesses. The ALJ also received many exhibits, including petitioner's notes of his sessions with SM, diary entries made by SM during the time that she saw petitioner, Berry's notes, petitioner's investigator's notes of a conversation with SC, the three cards that petitioner had sent SC, as well as other exhibits. The ALJ issued a 19-page proposed order that determined that the board had failed to prove that petitioner had violated professional standards in his treatment of either SM or SC.

The board subsequently issued an amended proposed order that concluded petitioner had violated professional standards with regard to his treatment of SM and imposed sanctions, but agreed with the ALJ that it had not proved violations with regard to SC. Petitioner filed exceptions to that order. The board then issued its 31-page final order, which is the subject of this judicial review.

The final order rejected petitioner's exceptions and adhered to its conclusions in the amended proposed order. Petitioner does not challenge the board's findings, as clarified in the board's response to petitioner's exceptions, that petitioner would sit next to SM during sessions, put his arm around SM to comfort her when she cried during sessions, and hugged SM at the end of sessions; and that SM subjectively felt uncomfortable. Petitioner does challenge on judicial review several aspects of the board's final order that differ from the ALJ's proposed order. The most significant of those differences include the board's finding that its investigator, Berry, acted appropriately and did nothing to taint the reliability of the evidence, crediting all of SM's testimony at the hearing, rejecting portions of petitioner's testimony as incredible or unpersuasive, finding its own expert's testimony more persuasive than petitioner's expert in key respects, and modifying historical facts found by the ALJ, which we discuss in detail below.

The board concluded that petitioner's conduct in his sessions with SM violated ORS 675.070(2)(d)[3] (unprofessional conduct), Ethical Standard 2.01 (boundaries of competence), Ethical Standard 3.04 (avoiding harm), and Ethical Standard 10.01 (informed consent).[4] The board

[3] ORS 675.070(2)(d) provides:

"(2) The board may impose a sanction listed in subsection (1) of this section against any psychologist or psychologist associate or applicant, or, if applicable, any unlicensed person found in violation of ORS 675.010 to 675.150, when, in the judgment of the board, the person:

"* * * * *

"(d) Is guilty of immoral or unprofessional conduct or of gross negligence in the practice of psychology, including but not limited to:

"(A) Any conduct or practice contrary to recognized standard of ethics of the psychological profession or any conduct or practice that constitutes a danger to the health or safety of a patient or the public, or any conduct, practice or condition that adversely affects a psychologist or psychologist associate's ability to practice psychology safely and skillfully.

"(B) Willful ordering or performing of unnecessary tests or studies, administration of unnecessary treatment, failure to obtain consultations or perform referrals when failing to do so is not consistent with the standard of care, or otherwise ordering or performing any psychological service or treatment which is contrary to recognized standards of practice of the psychological profession[.]"

[4] The Ethical Standards cited by the board are from the American Psychological Association's "Ethical Principles of Psychologists and Code of Conduct." At the time of the hearing in this case, the board had adopted the 2002 version of those standards, OAR 858-010-0075 (Mar 26, 2008), and petitioner does not argue that an earlier version should have been applied to his conduct. Thus, we rely on the 2002 standards, as did the ALJ and the board below.

Ethical Standard 2.01, boundaries of competence, provides:

"(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

"(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

"(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

"(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which

concluded that petitioner violated those professional standards because petitioner used touch as a therapy intervention with SM (an "emerging area" in psychology) without "first establishing a strong therapeutic alliance" and while failing to monitor SM's reactions to being touched, failing to make chart notes documenting his use of touch and his rationale for doing so, and failing to address touch with SM in his intake informed-consent documents or in his chart notes, and because SM was "strongly" affected "to the extent that she will never see a male counselor again."

On judicial review, petitioner challenges the board's modifications in the final order, challenges the board's

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psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

"(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

"(f) When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles."

Ethical Standard 3.04, avoiding harm, provides:

"Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable."

Ethical Standard 10.01, informed consent to therapy, provides:

"(a) When obtaining informed consent to therapy as required in Standard 3.10, Informed Consent, psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers. (See also Standards 4.02, Discussing the Limits of Confidentiality, and 6.04, Fees and Financial Arrangements.)

"(b) When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation. (See also Standards 2.01e, Boundaries of Competence, and 3.10, Informed Consent.)

"(c) When the therapist is a trainee and the legal responsibility for the treatment provided resides with the supervisor, the client/patient, as part of the informed consent procedure, is informed that the therapist is in training and is being supervised and is given the name of the supervisor."

interpretation of the Ethical Standards as improper rulemaking without notice, and argues that the record lacks substantial evidence to support the board's ultimate conclusions that he violated professional standards. Because we find several of the disputed historical facts are not as found by the board, we reverse and remand for the board to reconsider its decision, as required by ORS 183.650(4), and we do not reach petitioner's other challenges.

When an agency modifies an ALJ's findings of historical fact under ORS 183.650(3), we review those modified findings *de novo* under ORS 183.650(4), applying a preponderance of the evidence standard to our assessment of the record.[5] *Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 266 Or App 52, 63, 337 P3d 911 (2014), *rev den*, 356 Or 690 (2015). However, when an agency modifies an ALJ's order by making additional findings, it is a modification under ORS 183.650(2), which requires an explanation by the agency. We review additional findings for substantial evidence under

[5] ORS 183.650 provides:

"(1) In any contested case hearing conducted by an administrative law judge assigned from the Office of Administrative Hearings, the administrative law judge shall prepare and serve on the agency and all parties to the hearing a form of order, including recommended findings of fact and conclusions of law. The administrative law judge shall also prepare and serve a proposed order in the manner provided by ORS 183.464 unless the agency or hearing is exempt from the requirements of ORS 183.464.

"(2) If the administrative law judge assigned from the office will not enter the final order in a contested case proceeding, and the agency modifies the form of order issued by the administrative law judge in any substantial manner, the agency must identify the modifications and provide an explanation to the parties to the hearing as to why the agency made the modifications.

"(3) An agency conducting a contested case hearing may modify a finding of historical fact made by the administrative law judge assigned from the Office of Administrative Hearings only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. For the purposes of this section, an administrative law judge makes a finding of historical fact if the administrative law judge determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.

"(4) Notwithstanding ORS 19.415(3), if a party seeks judicial review of an agency's modification of a finding of historical fact under subsection (3) of this section, the court shall make an independent finding of the fact in dispute by conducting a review de novo of the record viewed as a whole. If the court decides that the agency erred in modifying the finding of historical fact made by the administrative law judge, the court shall remand the matter to the agency for entry of an order consistent with the court's judgment."

ORS 183.482(8)(c). *Weldon*, 266 Or App at 69-70; *Becklin v. Board of Examiners for Engineering*, 195 Or App 186, 206, 97 P3d 1216 (2004), *rev den*, 338 Or 16 (2005).

In taking *de novo* review of a modified finding of historical fact, when the fact is predicated on a witness's credibility or the persuasiveness of expert testimony—although neither is *per se* a "historical fact" in itself—we must make an independent assessment of that witness's credibility or the persuasiveness of the expert's testimony. *Corcoran v. Board of Nursing*, 197 Or App 517, 529, 107 P3d 627 (2005). We also must make an independent finding of the disputed historical fact based on a review of the record as a whole. *Id.* That is, we are not limited to choosing between the ALJ's finding and the agency's finding; instead, we must make the finding based on our independent assessment of how the evidence preponderates. *Id.* at 530. Because we make the finding independently, we are "free to determine that the evidence in the record is so unreliable that we cannot determine 'the fact in dispute' by a preponderance of the evidence." *Id.*

It is sufficient to invoke our *de novo* review of a modified finding if a petitioner points out the modification and provides record citations to the evidence that supported the ALJ's finding and that are contrary to the agency's finding. *WaterWatch of Oregon v. Water Resources Dept.*, 268 Or App 187, 227, 342 P3d 712 (2014); *Weldon*, 266 Or App at 64; *see also Corcoran*, 197 Or App at 526 ("Any petitioner who asks this court to engage in *de novo* review under ORS 183.650(4) *must specifically* identify *each* challenged modification of a finding of historical fact and *explain* why that modification was erroneous[.]" (Emphases in original.)). Here, plaintiff has met that standard, and, thus, we proceed to address his assignments of error challenging the board's modifications to the ALJ's findings of historical fact.

We begin by noting that, in addition to the findings of historical fact discussed below, petitioner also has assigned error to the board's modification of the ALJ's assessment of the reliability of SM's testimony, the nature of the board's investigation and alleged interference in petitioner's discovery efforts, the staleness of the evidence in SM's case, and

the persuasiveness of the competing expert testimony. As noted above, although those matters are not findings of historical fact that we are tasked with independently finding under ORS 183.650(4), we conclude that the modified findings of historical fact that we must confront are dependent on us making an independent assessment of those matters because they bear on the reliability of the evidence in the record. Thus, although we do not address those assignments of error separately, our independent assessment of those matters is incorporated in the findings that we make below.

In particular, it is our assessment that the reliability of the evidence has been negatively affected by the board's failure to properly inform petitioner of SM's mother's complaint when it was made, which resulted in petitioner not having recollections of the sessions with SM independent of his chart notes; the board's significant delay in investigating that complaint and interviewing SM; SM's inability to recall any details of her sessions with petitioner aside from details suggested by her mother's 2003 complaint; and the manner in which Berry investigated the matters, which likely influenced SM's recollections.

Turning to the modified findings, we first reject the board's modified finding that petitioner led SM out of his office after each session by grabbing her hips from behind and walking her out into the hall. We find that the evidence does not preponderate in favor of such a finding. Rather, we echo the ALJ in finding that SM's testimony in that regard was implausible based on her description of the conduct (grabbing both her hips from behind and walking one to two feet into the hallway like how children play "train"), the alleged frequency (every session), and the office layout and dynamics (several professionals on similar client schedules sharing the same hallway). In so finding, we iterate that we are not finding that the alleged conduct never happened, but, rather, we are finding that the board did not prove by a preponderance of the evidence that the conduct occurred.

The next modified finding challenged by petitioner that we address relates to an alleged kiss on the cheek that petitioner gave SM at the end of their last session. The ALJ found that there was some corroboration that petitioner

gave SM a kiss on the cheek, that petitioner denied the kiss, and that the evidence was at best inconclusive either way. In contrast, the board credited SM's testimony in general (which included testimony that petitioner tried to kiss her on the lips but kissed her cheek) and found that petitioner kissed SM on the cheek.

We first reject without discussion the board's preservation challenge to petitioner's assignment of error. We also reject the board's argument that it did not modify the ALJ's findings and that it did not find that petitioner had attempted to kiss SM on the lips. The board did find that petitioner attempted to kiss SM on the lips, at least implicitly, because the board explicitly credited all of SM's testimony on the matter. The board also explicitly found that petitioner *did* kiss SM on the cheek, which was a modification of the ALJ's findings. On *de novo* review, we find that petitioner did not attempt to kiss SM on the lips. However, we find that the evidence establishes that petitioner did give SM a kiss on the cheek goodbye at the end of their last session based on SM's contemporaneous accounts to her mother and in her diary.

We next address petitioner's challenge to the board's modified finding that petitioner used touch as a treatment modality in his treatment of SM. We reject the board's contention that it did not make such a finding. On review of the board's order, it is apparent that, not only did the board explicitly make the modified finding challenged by petitioner—as clarified by the board in its response to petitioner's exceptions—but that that finding was crucial to the board's conclusions that petitioner violated professional standards.

Petitioner's challenge to the modified finding here requires discussion of the underlying findings of the ALJ and the board, because it is those underlying findings that make the challenged finding significant. First, the ALJ noted in the proposed order that, presumably, the board cited Ethical Standard 2.01 (boundaries of competence) in its complaint against petitioner, "because the [b]oard considers the use of touch as a modality to fall within the 'emerging areas' noted in subsection (e)." The board agreed, without modification,

that that was the reason that it cited Ethical Standard 2.01.

Second, the ALJ found that, based on the expert testimony, there is a distinction between "touch as a modality" or "therapeutic touch," which is a controversial tool (that is, an "emerging area") that involves the conscious use of physical touch to treat a client's complaints, and the use of "general" touch or "comforting" touch, which can be part of the normal communication process. The ALJ found that any kind of touch "may or may not be appropriate depending on the circumstances of its use." The ALJ further found that petitioner makes a distinction between therapeutic touch and general touch, and that he does not use touch as a modality in his practice, but that he "sees some value in touch in the communication with his client, even if it is not a modality he uses." Although the ALJ did not explicitly categorize the type of touch used by petitioner with SM, based on the above findings and its ultimate conclusion, the ALJ implicitly found that petitioner did not use therapeutic touch or touch as a modality with SM.

In the final order, the board repeated the ALJ's findings with regard to the expert testimony, and, based on it finding Dr. Sorenson (the board's expert) persuasive, added that "a clinician must have a clear rationale for using touch as an intervention and should document its use in the chart." Dr. Sorenson's opinion was premised on petitioner using therapeutic touch. In contrast to the ALJ, the board found that petitioner's use of touch with SM violated professional standards because he touched SM "without first establishing a strong therapeutic alliance and failed to monitor SM's reactions, both verbal and non-verbal and to make a corresponding chart note," because his use of touch made SM "feel very uncomfortable," and because "the use of touch remains a developing form of treatment that requires a clinician to obtain informed consent and documenting that in the chart," which petitioner did not do.

In response to petitioner's exceptions, the board further clarified repeatedly that it found that petitioner's use of touch went "well beyond" what could be characterized as "general" touch and was instead used by petitioner as an

"intervention" in his therapy with SM. In the most salient of its clarifications, the board explained:

> "The Board affirms its findings, but wants to clarify that it is not stating that a clinician must chart every instance of casual touch during therapy. The Board's findings in this matter are predicated on the conclusion that [petitioner] engaged in more than casual touch. The Board has found that [petitioner] purposefully and repeatedly sat next to SM, put his arm around her to comfort her on repeated occasions during therapy sessions, hugged her at the end of sessions, placed his hands on her hips to guide her out of the office, and gave her a kiss on the cheek at the end of the last session. *** This Board views such conduct as going beyond the use of 'general touch.' [Petitioner's] insistence that he was not using touch as a treatment modality during his sessions with SM is not persuasive. The Board is not creating a new standard, but is enforcing an existing standard that is well supported by the professional literature."

Thus, both the ALJ and the board found, based on the expert testimony, that touch as an "emerging area" in Ethical Standard 2.01(e) included touch as a modality or intervention, and not general or comforting touch. Likewise, based on Dr. Sorenson's testimony, and as clarified in the final order, for the board, it was only "touch as an intervention" that required a "clear rationale" and documentation in the chart. The ALJ and the board departed, however, on the finding of historical fact of what type of touch petitioner used with SM during her sessions.

On *de novo* review, and particularly taking into account the testimony of both experts, we agree with the ALJ's assessment of the evidence. As set out above, both the ALJ and the board concluded that touch as a treatment modality or intervention is an "emerging area," and that "general" or "comforting" touch is not. Based on that shared understanding and the expert testimony on the differences in those types of touch, we find that petitioner did not use touch as a treatment modality (nor, as variously stated by the board, as a "therapeutic intervention," an "intervention," or a "developing form of treatment") in his sessions with SM,

and that petitioner only ever used general or comforting touch with SM.[6]

The foregoing discussion leads naturally into petitioner's next challenge. Both the ALJ and the board discussed that physically touching a client requires the clinician to obtain the client's informed consent, and petitioner does not take issue with that concept. However, petitioner challenges the board's modification of findings of the ALJ that relate to whether petitioner obtained SM's informed consent. Specifically, petitioner points to the ALJ's findings that petitioner established that he asks before he touches a client, that SM agreed to petitioner touching her each time he asked, and that, though SM was uncomfortable, there was no evidence that established that petitioner should have been aware of her discomfort.[7] Although the board adopted the ALJ's finding that petitioner generally asks before touching a client, the board also ultimately found, contrary to those findings, that petitioner failed to always ask permission before touching SM and failed to observe her reactions to being touched.[8] We address only those two

[6] We note that, in making that finding, we express no opinion on whether the use of "general" or "comforting" touch can result in the violation of a professional standard. We presume, depending on the appropriateness of the touch under the particular circumstances of a case, it could. Here, however, our comments are limited to finding the disputed historical fact of the type of touch used by petitioner with SM, as defined by the persuasive expert testimony presented in this case.

[7] In two different sections of the proposed order, the ALJ found the following:

"[T]he evidence in the case only shows (from SM's recollections several years later) that there was some touch, that it made her ultimately uncomfortable, but she did not let [petitioner] know it made her feel uncomfortable. [Petitioner] is unable to respond to specifics, but has generally established that he asks permission before touching a client."

"[A]ll the evidence shows is that SM at some point became uncomfortable with [petitioner's] use of physical touch—touch she agreed to—and never told him about her discomfort. If this matter had been raised with [petitioner] in 2003 or 2004, valid questions could have been raised about whether he should have noticed her discomfort in the process of obtaining informed consent. SM did not do anything wrong by failing to advise [petitioner] of her discomfort with his touch. At this late date, it is not possible to determine whether [petitioner] should have noticed her discomfort without her mentioning it."

[8] For example, among others, the board made the following findings in three different parts of the final order:

"In this case, [petitioner] repeatedly touched [SM] in a manner that made her feel uncomfortable. [Petitioner] did not assess the effect his manner of

modifications by the board, because petitioner's assignment does not address with specificity any of the other related board findings.

We first reject without discussion the board's preservation challenge to petitioner's assignment of error. On *de novo* review, we again find that the historical facts are as articulated by the ALJ. The board's contrary findings were explicitly made based on the lack of documentary evidence that petitioner obtained permission or assessed SM's reactions, specifically the lack of particularized chart notes by petitioner. However, through testimony, petitioner did establish that he asks for permission before touching a client, and SM admitted that she agreed to being touched when petitioner asked but could not recall how often he asked. Based on that evidence, we find that petitioner asked, and obtained, SM's permission before touching her. Also, the record does not contain evidence that would support a finding that petitioner failed to assess the observable reactions of SM to being touched by him. Petitioner testified that he makes an effort to observe the verbal and nonverbal reactions of a client to determine if the client is feeling comforted and stops the touch if he observes any discomfort. The board did not present any evidence to the contrary.

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touch was having on [SM] and did not recognize that he was causing her discomfort."

"The Board finds that [petitioner] touched SM during the therapy sessions in 2003 without first establishing a strong therapeutic alliance and failed to monitor SM's reactions, both verbal and non-verbal and to make a corresponding chart note. It is not the responsibility of the client to articulate discomfort; rather, it is the duty of the clinician to obtain a client's informed consent and to monitor the client's reactions to be[ing] touched by the therapist. [Petitioner] failed to do this. A careful review of [petitioner's] chart notes reveals no mention of the use of touch during any session."

"It is imperative for a clinician to obtain the informed consent of the client before using touch as an intervention during therapy sessions. [Petitioner] failed to do so, as evidenced by his failure to document that discussion in the chart. The [b]oard recognizes that SM testified that [petitioner] asked her a couple of times if he could sit next to her on the couch, and recalls him asking her one time if he could put his arms around her or hug her. *** [Petitioner] failed to document his thought process or that he discussed the use of touch with SM. [Petitioner] also failed to document that he considered or discussed the risks or the alternatives to the use of touch, and failed to inform this teenage client that she had the right to tell him no."

We also briefly address petitioner's challenge to the board's modification of finding number 6. In that finding, the ALJ found that, in relation to investigating SC's complaint, Berry had phoned Nancy Wernecke, a mental health practitioner for SC, and told Wernecke that "she had sent her a release, not mentioning that the release was signed by SC's father and not SC," who was then 18 years old, so that Wernecke began telling the investigator protected information. The board modified that finding to find that the investigator could not remember whether she told Wernecke that she did not have a release signed by SC. On *de novo* review, we find that the investigator referred only to a "release" without telling Wernecke that the release was signed by SC's father and not SC.[9]

Although it appears that petitioner does raise additional challenges to modifications of historical fact that petitioner argues the board made, we do not address those challenges because petitioner raised them for the first time in his reply brief. *See, e.g.*, *Clinical Research Institute v. Kemper Ins. Co.*, 191 Or App 595, 608-09, 84 P3d 147 (2004). We thus proceed to address petitioner's assignments of error regarding two additional findings made by the board in the final order.

As briefly noted above, when an agency makes findings that are in addition to those made by the ALJ, those additional findings are modifications of an ALJ's proposed order other than modifications of findings of historical fact. Under ORS 183.650(2), an agency is required to identify and explain those additional findings, and, ultimately, we review the additional finding for substantial evidence. *Becklin*, 195 Or App at 206. "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c).

Petitioner first challenges the board's additional finding that petitioner "plac[ed] his arm around [SM], massaging

[9] In response to petitioner's assignment of error, the board argues only that the finding is irrelevant to its conclusions. Regardless of whether the board believes the modified finding of historical fact that it made was irrelevant, our task, under ORS 183.650(4), is to resolve that disputed historical fact. Thus, we address petitioner's assignment of error.

her neck and shoulders," a finding that petitioner asserts the board made "in passing" without explanation and without substantial evidence to support it. The board responds that it did not make that finding.

We reject the board's argument. In its responses to petitioner's exceptions, the board made explicit the finding of historical fact complained of by petitioner, which was only implicit in the body of the board's final order. That finding was not an explicit, nor implicit, finding in the ALJ's proposed order. The board did not identify or explain that additional finding, as required by ORS 183.650(2), which was error. Additionally, SM testified only that petitioner would put his arm around her when she was crying to console her and that petitioner would rub her shoulder or her neck "a little bit" while his arm was around her, but that it was not a massage. SM's testimony is very different in character from the board's finding; thus, we conclude that the board's finding is not supported by substantial evidence in the record.

Petitioner also challenges, as an additional finding by the board, the finding that SC refused to participate in the investigation of her father's complaint or sign a release. We reject petitioner's assignment of error because the board's finding neither modified nor added to the ALJ's proposed order, which also contained the finding that SC refused to participate in the investigation and did not sign a release. Additionally, there is substantial evidence in the record to support that finding.

Having found that several historical facts are not as found by the board, we must remand for the board to reconsider, under a correct understanding of the facts, its conclusions that petitioner violated ORS 675.070(2)(d) (unprofessional conduct), Ethical Standard 2.01 (boundaries of competence), Ethical Standard 3.04 (avoiding harm), and Ethical Standard 10.01 (informed consent) in his treatment of SM. As a result, we do not reach petitioner's other assignments of error, which challenge the board's interpretation and application of those professional standards under the board's view of the facts.

Reversed and remanded.

BEFORE THE

BOARD OF PSYCHOLOGIST EXAMINERS

STATE OF OREGON

In the Matter of the License to Practice: as a Psychologist of: DAVID T. BICE, Ph.D. Licensee.	OAH Case No. 1001985 Agency No. OBPE 2009-035 & 2010-007 RESPONSE TO MOTION FOR STAY

On April 10, 2013, Licensee submitted through his counsel a Motion for Stay and Affidavit. The Board of Psychologist Examiners (Board) has reviewed and now responds to his motion to stay enforcement of the Board's Final Order, which requires Licensee to complete coursework pre-approved by the Board's designee and to practice for a minimum of one year under the supervision of a licensed psychologist.

1.

In regard to the above-referenced matter, Licensee asserts that he has presented a colorable claim of error and would suffer irreparable injury in the absence of a stay. The Board has determined that substantial public harm will not result from the granting of the stay.

2.

Pursuant to ORS 183.482(3)(c), when an agency grants a stay, the agency may impose reasonable conditions and that the petitioner should file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time. The Board directs that the parties file all documents necessary to bring this matter to issue before the Court of Appeals without extension, absent an extraordinary circumstance.

3.

The request for stay while the appeal is pending for the enforcement of the Board's Final Order in this case is hereby granted.

IT IS SO ORDERED this 17th day of May, 2013.

BOARD OF PSYCHOLOGIST EXAMINERS
State of Oregon

REDACTED

Becky Eklund
Interim Executive Director

BEFORE THE
BOARD OF PSYCHOLOGIST EXAMINERS
STATE OF OREGON

IN THE MATTER OF:	)	Agency Case Nos. 2009-035, 2010-007
DAVID T. BICE, Ph.D.	)	
Licensee	)	FINAL ORDER

HISTORY OF THE CASE

On September 15, 2010, the Board of Psychologist Examiners (Board) issued a Notice of Proposed License Suspension and Restriction (Notice) to David T. Bice, Ph.D. (Licensee) Licensee requested a hearing on October 14, 2010.[1] On October 18, 2010, the matter was referred to the Office of Administrative Hearings (OAH), where it was ultimately assigned to Administrative Law Judge (ALJ) Rick Barber.[2]

A hearing was held from November 14 through 17, 2011, in Salem, Oregon. Licensee appeared and was represented by Steven Sherlag, Attorney at Law. The Board was represented by Senior Assistant Attorney General Warren Foote. The Board called the following witnesses: Licensee; SM; SM's mother[3]; SC's father, MD; Erik Sorensen, Ph.D.; Karen Berry, Board Investigator; and Lisa Maas, Ph.D. Licensee called the following witnesses: Ofer Zur, Ph.D.; Pam Rathbone, RN; Daniel Reisberg, Ph.D.; Carmen Davis, Ph.D.; Nancy Wernecke, PMHNP; Doreen Dodgen-Magee, Ph.D.; and himself. The evidentiary record closed at the end of the hearing on November 17, 2011, but the hearing record was held open to receive post-hearing motions from Licensee, and the Board's Reply. The hearing record closed on December 15, 2011.

Prehearing Motions. On August 15, 2011, Licensee filed a Motion to Dismiss Allegations Pertaining to Patient A, as well as a Discovery Motion. (Docs. P14, P15) On August 25, 2011, the Board responded to both motions. (Docs. P17, P18) Oral argument was held on September 2, 2011, and the Ruling on Motions issued on September 22, 2011. (Doc. P20)

On October 31, 2011, Licensee filed a Motion for Reconsideration. (Doc. P22) The Board responded on November 1, 2011, and Licensee filed a Reply on November 3, 2011. (Docs. P23, P24) The Motion for Reconsideration was denied. (Doc. P25)

On November 10, 2011, Licensee filed a Motion for Stay of Proceedings and Motion for Discovery Order Review by the Chief Administrative Law Judge. (Docs. P26, P27) The Board

[1] Licensee's previous counsel filed the hearing request and his Answer. (Doc. P2).
[2] ALJ Samantha Fair had initial responsibility for the file.
[3] The Board has changed the references to certain witnesses in the proposed order to preserve the confidentiality and privacy of those involved.

replied on November 10, 2011. (Doc. P28) Chief ALJ Karla Forsythe denied the motions on that same date. (Doc. P29)

Posthearing Motions. Although the evidentiary record closed on November 17, 2011, Licensee requested the opportunity to file post-hearing motions. On December 8, 2011, Licensee filed a Post-Trial Motion to Dismiss on the same grounds as his prehearing motion. The Board's Reply was filed on December 15, 2011, and the record closed on that date. The matters raised in the motions were taken under advisement, and are addressed herein.

ISSUES

1. Whether the Board's action against Client A should be dismissed based upon the equitable doctrine of laches.

2. Whether, with regard to Client A, Licensee committed the following violations:

   a. Unprofessional conduct, violating ORS 675.070(2)(d);
   b. Boundaries of Competence, violating Ethical Standard (ES) 2.01;
   c. Sexual Harassment, violating ES 3.02;
   d. Avoiding Harm, violating ES 3.04;
   e. Multiple Relationships, violating ES 3.05; and
   f. Informed Consent, violating ES 10.01

3. Whether, with regard to Client B, Licensee committed the following violations:

   a. Boundaries of Competence, violating Ethical Standard (ES) 2.01;
   b. Avoiding Harm, violating ES 3.04;
   c. Multiple Relationships, violating ES 3.05; and
   d. Informed Consent, violating ES 10.01

4. Whether, if the violations are proved, Licensee should receive a one-year suspension, a restriction from treating female clients under the age of 25, and be required to pay a civil penalty of $5,000.

EVIDENTIARY RULING

Exhibits A1 through A37, offered by the Board, were admitted into evidence without objections. Exhibits L1 through L15, offered by Licensee, were also admitted into evidence without objection.

FINDINGS OF FACT

1. Licensee has been licensed as a psychologist in Oregon since 1975. He was previously licensed in Wisconsin (now inactive), and is also licensed in Washington. He has a Ph.D. in Counseling Psychology from the University of Missouri, and has been in private practice at his current location since 1985. (Ex. L6)

The Investigations

2. Client SM had seven therapy sessions with Licensee, from August 4, 2003 through September 19, 2003. SM's mother became concerned when her daughter stated she was "uncomfortable" in the sessions. SM's mother reported the matter to the Board investigator, Karen Berry, indicating that Licensee's behavior with SM was personal and physical without being overtly sexual. SM was unwilling to participate in the complaint because her stepmother, (the wife of her father, who had just passed away), was treating with Licensee and SM did not want to interfere with that therapy. (Ex. A1 at 4; Test. of SM, and SM's mother)

3. Because SM refused to participate in the complaint at that time, the Board voted to dismiss the complaint against Licensee without further investigation. In violation of its own rule, the Board never informed Licensee of the complaint against him, or of its dismissal. (Test. of Berry) The complaint was dismissed on January 17, 2004. (Ex. A1 at 6)

4. Some time after September 2009, Berry prepared a report for the Board in a case involving Licensee's treatment of another young woman, SC. The complaint was filed by SC's father, alleging that Licensee had crossed professional boundaries in his treatment of his daughter. SC refused to participate in the complaint, and refused to sign a release to allow the Board to review her chart.[4] In Berry's memorandum to the Board, she referred to the previous SM case (the one that was dismissed) as a previous case involving "sexual improprieties with a complainant's daughter." (Ex. A2)

5. Although the Board did not have a signed release from SM,[5] the Board instructed Berry to investigate further by re-contacting SM's mother and her daughter, SM, to see if SM was willing, six years later, to press a complaint against Licensee. SM was willing to pursue the complaint at that time at the urging of Berry and her mother. (Test. of SM, Berry)

6. Berry also contacted others to obtain more information about SM, SC, and Licensee. She phoned Nancy Wernecke, a mental health nurse practitioner for SC, to discuss the case. The ALJ stated in his Proposed Order that Berry told Wernecke that she had sent her a release, not mentioning that the release was signed by SC's father and not SC,[6] so Wernecke

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[4] The proposed order stated that the Board did not have permission to review or discuss SC's case. This reflects a misunderstanding of the Board's investigative powers. The Board will contact clients during the course of an investigation and ask for a signed release to review chart notes relevant to the Board's investigation, but the Board does not need the permission of a client to review or discuss any case under investigation. The Board has all powers necessary or proper to carry the granted powers into effect, to include: "To investigate alleged violations of ORS 675.010 to 675.150." ORS 675.110(8).

[5] Once again, the proposed order stated that the Board did not have permission to review or discuss this case. As stated in the previous footnote, the Board does not need the permission of a client to review or discuss any case under investigation. This function is part of the Board's broad statutory authority to conduct investigations and to exercise general supervision over the profession.

[6] The Board's Amended Proposed Final Order erroneously stated that SC was a minor at the time the release was signed by her father, but was 18 when Berry had this conversation with Wernecke. SC's father signed the release after SC's 18th birthday. (Test. of Berry at 622).

began telling Berry about SC's protected information. (Test. of Wernecke)[7] The Board notes that Berry could not recall if she affirmatively told Wernecke that she did not have a release signed by SC, but Berry did send Wernecke a copy of the release that had been signed by SC's father prior to speaking with her. (Test. of Berry at 621-622)

7. Berry contacted DC, an acupuncturist and former client of Licensee's, whose father had filed a complaint about Licensee's billings (later dismissed) Berry told DC that "several young women" had come forward accusing Licensee of inappropriate conduct, and asked DC about her experiences with Licensee. DC told Berry she had had no complaints about Licensee, but Berry kept asking questions and taking her comments out of context, upsetting DC. (Test. of DC, Ex. L1) DC filed a complaint with the Board about Berry's investigatory tactics. (Ex. L14, Ex. A23, Test. of DC)

8. On June 16, 2010, the Board contacted Licensee and asked for a response concerning three cards sent to SC, phone calls made to SC, and other matters. The letter also included questions about the 2003 treatment of SM. (Ex. A6) Licensee could not respond with any specifics about SC because he had no release from SC. (Test. of Licensee)

9. When Berry re-approached SM's mother about the 2003 complaint, she spoke with SM and SM was willing to pursue the matter at least in part because she had been told there was another case involving a "similar situation." Berry took a statement from SM, and also read to her a statement written by SM's mother in 2003, highlighting the portions which SM agreed she remembered. Berry could not remember at hearing whether she took the statement before or after going over the 2003 statement with SM, although Berry said it was her customary practice to start an investigative interview by asking the witness "to just tell me their story first." (Test. of Berry at 602 -603)

10. On May 4, 2010, Berry sent an email to SM, asking for more information after interviewing Licensee. She asked this question, among others, and received this answer:

> [Berry's question]. Dr. Bice said he always asks a client before he moves closer to them during a session. Do you recall him asking you if it was OK to move closer to you?
>
> [SM's response]. Yes, I believe he would ask if it okay if he sat next to me, but I never felt comfortable enough saying NO.

(Ex. A20 at 1)

11. The mother of SM noticed in 2003 that SM began cancelling sessions with Licensee. When SM's mother asked SM what was happening, SM said that she was uncomfortable with Licensee. SM related that when she cried, Licensee would sit on the couch next to her and put his arm around her to console her, and that when she went to leave a session,

[7] Wernecke could not recall whether Berry explained that the release had been signed by SC's father, or if she referred to simply a release. (Test. of Wernecke at 647).

Licensee would put his hands on her hips and escort her out. During the last session, Licensee kissed her on the cheek as a sort of goodbye. (SM's mother at 73) On September 23, 2003, SM's mother discussed this with her therapist, Lisa Maas, Ph.D. Dr. Maas recorded in her chart note at the time that SM's mother reported SM telling her that Licensee had massaged her shoulders during sessions, and had sat on the couch next to SM, "arms around her – encouraging her not to go to college – "Are you going to miss me? Kissed her on cheek." (Ex. A16, at 1 and 2) Dr. Maas was concerned that professional boundaries had been breached and encouraged SM's mother to report this to the Board. (Test. of Mass at 266)

Client SM

12. SM was 17 years old when she first treated with Licensee. She turned 18 on August 5, 2003, the day after her first visit. She received treatment from Licensee on August 4, August 12, August 20, August 26, September 15, and September 19, 2003. (Ex. A1 at 4) SM had recently survived cancer, and her father had passed away shortly before she began treatment. SM had a great relationship with her father and his wife, although SM lived with her mother. The cancer treatment had brought the family members closer, although SM's mother and SM's father were amicable at best. After SM's father died, SM spent time with her stepmother and her family because they were grieving like her. SM's mother understood SM's need to grieve but did not have a similar experience of grief because of past issues with her ex-husband. This led to some tension between SM's mother and SM. (Test. of SM)

13. SM signed an Acknowledgment and Consent form in Licensee's office on August 4, 2003. That form indicated that SM had received and understood the *Notice of Privacy Practices*, and had been provided with a copy of that notice. (Ex. A24 at 3) Licensee's practice was to provide all of the forms, along with a copy of the acknowledgment, to the client. (Test. of Licensee) SM received several pages of paperwork on August 4, 2003, but does not remember what they said. She did not retain them after so many years. (Test. of SM)

14. SM filled out an eight page Intake Evaluation at the initial evaluation, and Licensee went over it with her. (Ex. A24 at 12-20; Test. of SM)

15. Licensee took notes of his sessions with SM, as follows:

> 8/12/03
> S/A Focus on how numb she has been. She has not dealt with issues from cancer. Has so much sadness about her dad – but is blocking it all. Feels like the cancer and her dad's death have emotionally taken her back to a younger age. She also feels like her emotions are "frozen." Discusses dreams she has had about her father, talks about the fact that she feels little and alone. No one there to comfort her. Discuss whether she is ready to go to college because she will be even more alone and will know no one. My concern is about her repression and denial. Those defenses have her severely blocked right now – away from all familiar how much more numb and shut down will she be. I encourage her to cry and allow herself to go through the feelings. She indicates that she feels she will upset people if she were to decide to put school off. I support her in making decisions

that will help her in the long run, rather than please others. Wants two sessions a week.
P. Will work on expressing emotion.

8/18/03
S/A Work on grief. Will go to college. Kinesthetic difficulty expressing emotion. Needs comforting from family.
P. Follow up w/pictures & writing.

8/20/03
S/A Work on beliefs about "where you go when you die."
P. Follow her lead.

8/26/03
S/A Focus on how difficult it is for [SM] to verbalize her feelings. She falls between the cracks in all parts of her life. Others comfort [stepmother] & her sibs but, because [SM] is so quiet and internally focused, she gets overlooked. We work on ways she can process grief while away at college. She will need to call and do phone sessions & come to PDX when she can. Today focus on her rel. w/ dad, which was very physical – they hiked, ran and engaged in athletic experiences. He held her and touched – a lot of appropriate tactile experience. With him gone, she is not touched or held by anyone. It is like a kinesthetic vacuum. She often becomes numb and then her thoughts are scattered. Can't focus. We discuss medications for depression. She prefers to not take them. Work on ways to get comfort from others.
P. Follow up on ways to manage grief at college.

9/15/03
S/A Has been having trouble sleeping. Suggested melatonin since she doesn't want meds. She took 3mg melatonin last night and slept soundly for first time in weeks. She is feeling depressed. Address issues of numbing and anger at her body, God & Mom. Has been diagnosed with a new cyst on ovary. Discuss how to stay connected in school.
P. Follow up with planning.

9/19/03
S/A Work on limits setting. Has typical conflict with mom re: post divorce time sharing.
P. Follow her lead.

(Ex. A24 at 9-11) Licensee does not have any independent recollection of his treatment of SM, having not been informed there was a 2003 complaint against him until 2010. (Test. of Licensee)

16. SM kept a journal during the period of time after her father passed away, and covering the period of Licensee's treatment. Her entries, written to her deceased father, included:

> (8/7/03) * * * Well, I had my b-day 2 days ago (obviously) I'm 18! Hard to believe, even for me. It was a really really hard day. It was extremely hard not having you there. You were such a huge part of my life. Always the one I could count on to cheer me up, make me laugh, have fun with and feel loved by. You should have been there. I shouldn't have fucking had to go through my 18 b-day without a father. I really wish you would have been there. Shit, I wish you'd just be here period.
>
> * * * * *
>
> Oh, I'm seeing Dr. Bice, your old counselor. I didn't even know you had one, but I really like him. I've only seen him once, but he was really good. He's really nice and sensitive, but at the same time told me not to bullshit him. He's straight forward and I like that, probably cuz it reminds me of you. He talked to me about some really good things. He pointed out that maybe the reason I've felt like I haven't been getting signs from you is because I'm looking for too obvious signs because nothing's good enough—because I want you here.
>
> (8/15/03) [No reference to Licensee]
>
> (9/27/03) * * * And I no longer have a counselor I'm seeing. Dr. Bice was way too creepy for me. He was hugging me a lot or kissing me on the cheek & just a lot of weird stuff.
>
> (Ex. A37)

Client SC

17. SC was a client of Licensee's between April 2007 and September 2009. SC's father, did not know the nature of Licensee's treatment of his daughter but became concerned when SC would call Licensee at 8:00 in the evening (after an argument with SC's father), or Licensee might call SC. SC's father believed Licensee crossed professional boundaries in his treatment of SC. (Test. of father; Ex. A9 at 5) Licensee often sees clients in the evening, up until 9:00 pm. (Test. of Licensee, Dodgen-Magee)

18. SC wanted to go into therapy when she was a teenager, and SC's father agreed she should see Licensee. During the summer before her senior year in high school, SC's father suggested that she increase her treatments with Licensee. (Ex. A9 at 1) SC father believes that Licensee's treatment helped SC get through a tough time in her life. (Test. of SC's father)

19. SC did not participate in the investigation of Licensee, nor give permission for Licensee or the Board to review or discuss her records. When informed of the upcoming hearing

in October 2011, SC was surprised the matter was continuing. She believed that her father's complaint to the Board was an act of "emotional revenge" against her. (Ex. L3)

20. SC's father or his wife (SC's stepmother) found three cards that Licensee had sent to SC. A graduation card sent to her congratulated her on her high school graduation and Licensee added:

> Dear [SC]:
> This card doesn't say nearly enough about who you are and who you are becoming. But, I've told you before what I think and feel about all the changes you've made. All of that still stands. I wish you the best on your path. David Bice. (Ex. A8 at 1)

Another card was a birthday card and contained a personal message from Licensee:

> This is to remind you of how special you are, especially when life and you feel awful and ugly! I promised you many horses but you will need to keep faith when things seem darkest and trust that you have everything you need within your self to lead you to your best possible life! Love, David (*Id.* At 2)

The third card, another birthday message, was dated August 15, 2007:

> I just want you to know that I am glad you are here on this planet. It may not be the best deal going, but for some reason it's what we picked or where we were dropped off. Either way, it is still reassuring to know that there are still people who have the heart and spirit to take on this life, struggle through the mess that we call childhood and do their best to become genuine, loving, feeling, thinking, consciously compassionate human beings. You are one of these. I am grateful to you for the courage and trust that has allowed you to let me see this about you. Many thanks! I want to wish you the best of birthdays! Sincerely, David Bice
> (*Id.* at 3

When asked about this card in October 2011, SC wept and said it was "one of the most compassionate things anyone has ever done for me." (Ex. L3)

21. Ofer Zur, Ph.D., is a psychologist practicing in central California. He has written and published five books, including books on HIPAA, Boundaries in Psychotherapy, and Dual Relationships. He has written extensively on the Standard of Care. He has come to Oregon to teach at conferences sponsored by the Oregon Psychological Association (OPA), and is a Fellow of the American Psychological Association (APA) He has often signed cards to clients with the phrase "Love, OZ" and considers it appropriate in the correct context. The Board notes that when asked Zur was asked if he ever had a client misinterpret a note that he signed with "Love, Oz" he acknowledged: "Oh yeah. Oh, yeah. Absolutely." (Test. of Zur at 486.) Zur has read the messages sent from Licensee to SC, and considered them "beautiful." He would need to know the context of the messages, but sees nothing wrong with them in the context of what little he knows about SC. (Test. of Zur) The Board disagrees with Zur's assessment.

22. Zur teaches that the concept of "Informed Consent" is a progressive one, starting with the initial intake and changing with each decision made during therapy. He believes that touch can be therapeutic but must be used as part of an ongoing dialogue between therapist and client, discussing areas of discomfort as they occur. (Test. of Zur)

23. The Board finds that Licensee's conduct in sending a personal note to a teenage girl that is signed "Love, David" might be confusing and misunderstood in terms of the nature, the intensity of the relationship and its general meaning. (Test. of Sorenson at 297) But the statement by SC indicates that in this particular context, she did not misinterpret the note.

CONCLUSIONS OF LAW

1. The Board's action against Client A should not be dismissed based upon the equitable doctrine of laches.

2. With regard to Client A, based on the above findings, the Board concludes that Licensee violated certain ethical standards, as follows: Unprofessional conduct, violating ORS 675.070(2)(d); Boundaries of Competence, violating Ethical Standard (ES) 2.01; Avoiding Harm, violating ES 3.04; and Informed Consent, violating ES 10.01.

3. With regard to Client B, Licensee committed no violations.

4. Based on the above violations, the Board rejects the ALJ's recommendations and imposes certain specified sanctions.

OPINION

Post-Hearing Motions. As noted earlier, Licensee filed pre- and post-hearing motions to dismiss, contending that the matter involving SM (Client A) should be dismissed on the basis of the equitable doctrine of laches and because of investigatory misconduct.

Having reviewed the case law concerning the doctrine of laches, the ALJ agreed with the Board that Licensee's evidence does not establish an entitlement to a dismissal of the claim due to the Board's failure to apprise Licensee of the investigation in 2003. Likewise, although the ALJ stated that the evidence shows what was probably overreaching by the Board's investigation, there is no basis to dismiss the case on that account. The Board does not adopt the ALJ's suggestion in the proposed order that there was overreaching by the Board during the conduct of this investigation. The Board received a complaint regarding SC, a teenage young woman, in 2009. The Board recalled the earlier investigation in regard to SM, another teenage young woman, and directed it's investigator to contact SM's mother and SM in 2010. It was the decision of this Board to reopen this investigation and subsequently to issue the Notice of Proposed Disciplinary Action.

The Board agrees with the ALJ's decision to deny the motions to dismiss. But the Board rejects that ALJ's statement in regard to overreaching during the investigation, and does not adopt the ALJ's assertion in the proposed order that he would consider both the delay and the

conduct of the investigation in his findings of fact and ultimate conclusions.

On the Merits. The Board contends that Licensee committed the following violations of the statutes and the Ethical Standards (ES):

With regard to SM:

Unprofessional conduct, violating ORS 675.070(2)(d);
Boundaries of Competence, violating Ethical Standard (ES) 2.01;
Sexual Harassment, violating ES 3.02;
Avoiding Harm, violating ES 3.04;
Multiple Relationships, violating ES 3.05; and
Informed Consent, violating ES 10.01

With regard to SC:

Boundaries of Competence, violating Ethical Standard (ES) 2.01;
Avoiding Harm, violating ES 3.04;
Multiple Relationships, violating ES 3.05; and
Informed Consent, violating ES10.01

The Board has the burden to present evidence to prove its allegations against Licensee. ORS 183.450(2) It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard) Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987) In this case, the proposed order stated that the Board has failed to carry its burden of proof. The Board rejects that conclusion in regard to SM.

Nature of the Investigation. In his defense to the Board's charges in this case, Licensee has repeatedly claimed that the Board's investigator tainted any evidence through her investigative actions. Licensee contends that the Board erred in failing to advise Licensee of the investigation in 2003. The Board acknowledges that, under its own rules, it was required to advise Licensee of the investigation and did not.[8] Licensee also contends that the Board investigator tainted the evidence from SM, and sought to find other complainants by making misrepresentations to them.

The Board rejects any suggestion that the investigator tainted the evidence in this case. Furthermore, the Board concludes that the evidence in SM's case was not stale. What Licensee has established, and what the Board concedes, is that Licensee was not aware of the 2003 allegations against him until 2010.

[8] The language of the 2003 rule is unknown; currently, it is found at OAR 858-020-0065(2). The Board acknowledges that consistent with the Board investigator's admission at the hearing, the Board violated its own rule.

The Board acknowledges that if Licensee had been aware of the 2003 complaint involving SM; he could have formulated a response to the allegations at a time when he could still remember the particulars. Licensee's inability to remember the details of sessions held seven years earlier (quite logical in its own right), must be attributed the Board's failure to apprise him of the allegations in 2003.[9] Nevertheless, the Board notes that SM did sign a release and Licensee's chart notes are a part of the record. (*See* A 24)

Although the ALJ denied the applicability of laches because he was not convinced the doctrine applies in an administrative proceeding such as this, the ALJ stated that the staleness of the evidence in the SM case is crucial to the decision that he reached in that case. The Board rejects this conclusion. The record contains credible evidence that is not stale in regard to Licensee's conduct toward SM; to include what SM told her mother in 2003; the information that SM's mother provided to her therapist; the therapist's chart notes (Ex. A16); the personal journal entries that SM made at the time (Ex. A37); as well as SM's current recollection of the events.

SM's Complaint. The Board contends that Licensee committed unprofessional conduct and violated several ES's in his treatment of SM, including Boundaries of Competence, (ES) 2.01; Sexual Harassment, ES 3.02; Avoiding Harm, ES 3.04; Multiple Relationships, ES 3.05; and Informed Consent, ES 10.01. Each will be addressed below.

The Board's general authority to discipline and regulate its licensees is found in ORS 675.070, which states in part:

> **Authorized sanctions; grounds for imposing sanctions; civil penalty.** (1) Where any of the grounds enumerated in subsection (2) of this section exist, the State Board of Psychologist Examiners may impose any of the following sanctions:
>
> (a) Deny a license to any applicant;
>
> (b) Refuse to renew the license of any psychologist or psychologist associate;
>
> (c) Suspend the license of any psychologist or psychologist associate for a period of not less than one year;
>
> (d) Issue a letter of reprimand;
>
> (e) Impose probation with authority to restrict the scope of practice of a psychologist or psychologist associate or require practice under supervision;
>
> (f) Revoke the license of any psychologist or psychologist associate; or

[9] The proposed order stated that assuming that the Board believed SM mother's complaint was true, even a letter of warning to Licensee at that time, advising him of the allegations and the Board's decision not to pursue it, would have put him on notice and, importantly, might have prevented further episodes of what the Board feared was happening.

(g) Impose a civil penalty as set forth in subsection (3) of this section.

(2) Grounds exist for imposition of any of the sanctions enumerated in subsection (1) of this section against any psychologist or psychologist associate or applicant, or, where applicable, any unlicensed person found in violation of ORS 675.010 to 675.150, when, in the judgment of the board, the person:

* * * * *

(d) Is guilty of immoral or unprofessional conduct or of gross negligence in the practice of psychology which includes but is not limited to:

(A) Any conduct or practice contrary to recognized standard of ethics of the psychological profession or any conduct or practice that constitutes a danger to the health or safety of a patient or the public, or any conduct, practice or condition that adversely affects a psychologist or psychologist associate's ability to practice psychology safely and skillfully.

(B) Willful ordering or performing of unnecessary tests or studies, administration of unnecessary treatment, failure to obtain consultations or perform referrals when failing to do so is not consistent with the standard of care, or otherwise ordering or performing any psychological service or treatment which is contrary to recognized standards of practice of the psychological profession[.]

In addition, the Board has adopted the 2002 version of the APA Ethical Principles.[10]

Boundaries of Competence. In SM's case, the Board alleges that Licensee violated the ethical principle of Boundaries of Competence. The ES[11] states:

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation,

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[10] 858-010-0075 reads: **Code of Professional Conduct** The Board adopts for the code of professional conduct of psychologists in Oregon the American Psychological Association's (APA) "**Ethical Principles of Psychologists and Code of Conduct**" effective June 1, 2002.

[11] The APA's "Ethical Principles of Psychologists and Code of Conduct" code of conduct that contains enumerated ethical standards (ES).

disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

(f) When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles.

Although alleging that Licensee violated the Boundaries of Competence, the Board did not specifically argue any violation of that ES. This ES was cited because the Board considers the use of touch as a modality to fall within the "emerging areas" noted in subsection (e)

The use of touch as a modality of treatment is, by all accounts, controversial, and depends on the context. Dr. Zur's opinion suggests that touch is an important part of the way a therapist relates to a client. Spurning traditional psychotherapy (the followers of Freud), with its insistence on absolutely no physical contact, Zur contends that a total absence of touch is counterproductive and hurts the therapeutic process. Zur's use of touch goes beyond what Licensee is accused of doing—he will touch a client without asking permission, and gauge the effectiveness of the touch by the client's reaction. He will then discuss the touch as part of his ongoing "informed consent" conversation with the client, and proceed accordingly. Zur's testimony, coming from a fellow of the APA and an author and instructor in the pertinent areas of touch, the standard of care, and others, is compelling.

The Board considers Dr. Erik Sorenson's opinion about the use of touch in therapy significant and persuasive, and finds that a clinician must have a clear rationale for using touch as an intervention and should document its use in the chart. (Test. of Sorenson, 281-284, and Ex. A29) In this case, Bice repeatedly touched Client A in a manner that made her feel uncomfortable. Bice did not assess the effect his manner of touch was having on Patient A and

did not recognize that he was causing her discomfort.

Licensee is more conservative than Zur when it comes to the use of touch. He does not use it as a regular modality in his practice, and does not remember whether his interaction with SM involved touch. When asked about whether he comforted her as she sat and wept at her father's death, he responded "I hope so." In other words, Licensee sees some value in touch in the communication with his client, even if it is not a modality he uses.

The Board contends that Licensee lacks credibility because he testified (on the first day of hearing) that he did not use touch as a modality, but testified on the last day that he hoped he comforted SM with touch while she was grieving. Recognizing that Licensee does not have an independent recollection of the 2003 treatment (so his testimony was more broadly presented as to what he "would do"), the ALJ stated that to him, the issue appears to be one of confusion rather than credibility. Licensee (like Dr. Zur) makes a distinction between therapeutic touch (that is, the use of touch as a conscious tool to treat the client's complaints), and the use of touch in general (handshakes, appropriate hugs, etc.)

Furthermore, the ALJ stated that even SM's testimony supports the appropriateness of Licensee's actions in 2003, at least initially. Licensee does not remember the treatment of SM. However, SM told Berry that she believed Licensee asked permission before sitting next to her and touching her. SM was apparently uncomfortable with this touch, but admitted she did not know how to tell Licensee "no."

The Board's expert, Dr. Sorensen, also testified that touch may be appropriate in the context of patient care. It is often a "boundary crossing," which is not always but may be a "boundary violation." From Dr. Sorensen's testimony, as well as Dr. Zur's, the ALJ concluded that touch may or may not be appropriate depending on the circumstances of its use. Here, the evidence in the case only shows (from SM's recollections several years later) that there was some touch, that it made her ultimately uncomfortable, but she did not let Licensee know it made her feel uncomfortable. Licensee is unable to respond to specifics, but has generally established that he asks permission before touching a client. The Board rejects the conclusion in the proposed order that the Board has failed to show a violation of the Boundaries of Competence. The Board finds that Licensee touched SM during the therapy sessions in 2003 without first establishing a strong therapeutic alliance and failed to monitor SM's reactions, both verbal and non-verbal and to make a corresponding chart note. It is not the responsibility of the client to articulate discomfort; rather, it is the duty of the clinician to obtain a client's informed consent and to monitor the client's reactions to being touched by the therapist. Licensee failed to do this. A careful review of Licensee's chart notes reveals no mention of the use of touch during any session.

Sexual Harassment. The Board also alleges violation of ES 3.02, which states:

3.02 Sexual Harassment

Psychologists do not engage in sexual harassment. Sexual harassment is sexual

> solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, that occurs in connection with the psychologist's activities or roles as a psychologist, and that either (1) is unwelcome, is offensive, or creates a hostile workplace or educational environment, and the psychologist knows or is told this or (2) is sufficiently severe or intense to be abusive to a reasonable person in the context. Sexual harassment can consist of a single intense or severe act or of multiple persistent or pervasive acts. (See also Standard 1.08, Unfair Discrimination Against Complainants and Licensees.)

In its argument, the Board's counsel accused Licensee of "sexual solicitation" and unwelcome touching, but the evidence falls far short of those allegations. Licensee, who does not remember the sessions with SM, testified that (in general) he would not touch or sit next to a client without first asking permission.

SM admitted that Licensee probably asked permission before he sat next to her, but she felt too uncomfortable to say no. Other than SM's allegations that Licensee put his hand on her hips and that he kissed her once—neither of which, even if correct, were in the context of a sexual interaction—there is nothing in even SM's allegations that could be considered solicitation for sex.

The ALJ stated that he had some concerns about SM's testimony and her recollection after so many years. For instance, the proposed order stated that SM testified that she felt uncomfortable from the very first meeting with Licensee because of the touch issues. The Board does not agree with that observation. SM testified that her first reaction to Licensee was positive: "I think the first session I was—I liked that he was kind and I think that it went well. I didn't have any concerns at that time. I thought that he was comforting." (Test. of SM at 125) The Board concludes that SM's testimony was consistent with her contemporaneous journal:

> [8/07/03] Oh, I'm seeing Dr. Bice, your old counselor. *I didn't even know you had one, but I really like him. I've only seen him once, but he was really good. He's really nice and sensitive*, but at the same time told me not to bullshit him. He's straight forward and I like that, probably cuz it reminds me of you. He talked to me about some really good things. He pointed out that maybe the reason I've felt like I haven't been getting signs from you is because I'm looking for too obvious signs because nothing's good enough—because I want you here. (Ex. A37; emphasis added)
>
> (8/15/03) [No reference to Licensee]

According to her journal at the time, that first visit (two days before the August 7 entry) was "really good." The August 15 entry in the journal did not mention Dr. Bice at all, something that would be surprising if she was having problems with him, since she was writing honestly to her father about so many things, including the therapist they shared.

As noted, the only thing even possibly sexual in SM's allegations about Licensee's treatment is found in two allegations—that he put his hands on her hips to guide her out of the

office on every visit, and that he kissed her on the last visit. The proposed order stated that it strains credulity to believe that a professional such as Licensee would walk her into the office hallway where others could see him in that position. The Board rejects the finding of the proposed order that did not accept SM's testimony that Licensee placed his hands on her hips to guide her out of the room after the visits.

The proposed order stated that there is some corroboration to the kiss on the cheek, because SM's journal entry of September 27, 2003 indicates Licensee kissed her on the cheek. The Board notes that SM also told her mother about this conduct, which she in turn related to her therapist. However, in her 2010 testimony, SM stated that he tried to kiss her on the lips and she turned her head. An attempted kiss on the lips could arguably be sexual. The Board rejects the statement in the proposed order that a kiss on the cheek could be explained in the context of treatment, unless that contact was carefully documented in the chart.

Once again, there is a problem with the evidence here. Licensee does not remember the treatment with SM, but categorically denied he ever had kissed or put his hands on the hips of a client. Both witnesses testified generally credibly, although the ALJ doubted SM's 2010 recollections that Licensee grabbed her hips. The proposed order stated that the evidence is, at best, inconclusive either way. The Board finds that Licensee did kiss SM on the cheek and did place his hands on her hips as she left his clinic, but concludes that this conduct did not constitute conduct that was sexual in nature that was sufficiently severe or intense to be abusive to a reasonable person in the context. Licensee did not violate the Sexual Harassment ES.

Avoiding Harm. The Board alleges that Licensee's actions in 2003 caused SM to lose trust in male therapists, and could have been avoided if Licensee had taken reasonable steps to avoid harm:

> **3.04 Avoiding Harm**
>
> Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

In his Proposed Order, the ALJ stated that implicit in the Board's allegations is that Licensee did something that would foreseeably lead to SM's harm. However, all the evidence shows is that SM at some point became uncomfortable with Licensee's use of physical touch—touch that the proposed order said she agreed to—and never told him about her discomfort. The ALJ stated that if this matter had been raised with Licensee in 2003 or 2004, valid questions could have been raised about whether he should have noticed her discomfort in the process of obtaining informed consent. SM did not do anything wrong by failing to advise Licensee of her discomfort with his touch. The ALJ also found that at this late date, it is not possible to determine whether Licensee should have noticed her discomfort without her mentioning it.

Dr. Sorensen noted that not all touch is forbidden in a psychological practice. Dr. Zur testified that touch is a normal part of the process, something to be discussed as part of the "informed consent" conversation, with actions to be changed accordingly. In the best of all

situations, SM would have told Licensee that she was uncomfortable with his use of touch, and Licensee could have changed his actions. Once again, it is impossible to ask Licensee what cues

he noticed in SM's case, or why he touched her if he touched her. The ALJ found that Board has failed to prove a violation of this ES. The Board disagrees with this conclusion.

Licensee testified that although he did not recall the particular interactions that he had with SM, he did acknowledge that he does use "comforting" touch in therapy. (Test. of Licensee at 668, 672) Licensee testified that his use of touch depends "on the therapy context and the appropriateness and getting permission, asking if it would be comforting and if it seems like it would be supportive, yes." When asked if he charts that interaction, Licensee answered: "No, I don't. Not normally." (Test. of Licensee at 32) The Board notes that Licensee also acknowledged during his testimony that there are risks associated with using touch during therapy, to include if "it's inappropriate and if it's unwanted or if it's interpreted sexually or if the person is paranoid or hostile or apt to sexualize the touch, yeah, certainly." (Test. of Licensee at 33) Licensee later testified that he did not use touch as a therapeutic modality, but did use "comforting touch" with clients during therapy. (Test. of Licensee at 672) The Board is very concerned that Licensee does not make a chart note when he does decide to touch a client during a therapy session. Such a chart note serves to protect both the clinician and the client, and documents the clinician's thought process at the time. The Board notes that Licensee's conduct made SM feel very uncomfortable with him. During the last session with Licensee, when he gave her a long hug, she testified as to her feelings at the time: "the only way I can really explain it is to me it felt like I was leaving a relationship...." Her interactions with Licensee strongly affected her, to the extent that she will never see a male counselor again. (Test. of SM at 131, 133) The Board concludes that Licensee failed to avoid harm in regard to SM.

Multiple Relationships. This was the most confusing allegation made by the Board because of the great disparity between the expert opinions in the case. The ES states:

> **3.05 Multiple Relationships**
>
> (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.
>
> A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.
>
> Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

(b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur. (See also Standards 3.04, Avoiding Harm, and 3.07, Third-Party Requests for Services.)

It was evident that the Board and Dr. Zur use the term "multiple relationships" or "dual relationship" entirely differently. The Board contends that Licensee was in a multiple relationship situation with SM when he allegedly disagreed with her going away to college because, in SM's words, it felt like ending a relationship.

First, the evidence does not show that Licensee tried to dissuade SM from going to college. The only note that discussed the issue at length is the first one, and it was ambiguous as to who was taking which position or even *if* they were taking opposite positions on the topic. It was a topic of discussion in therapy, and that is all the evidence shows without the ability to ask meaningful questions of those involved. The next note discussed SM's decision to go to school, and there is no indication that Licensee ever tried to dissuade her, either before or after making that decision.

Second, according to Dr. Zur, what the Board describes in that situation is not a dual or multiple relationship at all. Dr. Zur testified (and has written) that multiple relationships exist when the therapist and client have another relationship outside therapy—the same church, the Rotary club, a familial relationship. That is different, Dr. Zur argues, than what Licensee is accused of doing with SM in 2003. Their discussions about whether to go to college were not separate from Licensee's role as the therapist—according to Zur, those discussions were part of Licensee's role as a therapist. There was not a dual relationship.

The ES appears to more closely follow Dr. Zur's definition. If there was anything close to a multiple relationship here, it was the fact that Licensee had also treated SM's father and her stepmother. That has not been raised as an issue. No violation of this ES has been shown. The Board agrees with this conclusion.

Informed Consent. The Board alleges that Licensee's intake forms used in 2003 (and given to SM) violated the following ES:

10.01 Informed Consent to Therapy

(a) When obtaining informed consent to therapy as required in Standard 3.10,

Informed Consent, psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers. (See also Standards 4.02, Discussing the Limits of Confidentiality, and 6.04, Fees and Financial Arrangements.)

(b) When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation. (See also Standards 2.01e, Boundaries of Competence, and 3.10, Informed Consent.)

(c) When the therapist is a trainee and the legal responsibility for the treatment provided resides with the supervisor, the client/patient, as part of the informed consent procedure, is informed that the therapist is in training and is being supervised and is given the name of the supervisor.

The Board's allegations here focus on the forms SM signed and received when she began her treatment with Licensee. Licensee provided the Acknowledgment Form to the Board, and the Board assumed that this document was the only one SM received. The evidence shows otherwise.

Licensee provided several documents with the form that is in evidence, and SM agreed that she took several documents home with her on the first visit. She does not have them seven years later. Licensee explained what the documents were, including the HIPAA form in use at the time and other documents concerning treatment and billing. Dr. Zur considered the documents adequate, and testified that Licensee's intake forms were an "A+" for their length and clarity.[12] The Board notes that Dr. Sorenson reviewed the Services Agreement presented by Licensee (Ex. L14), and observed that Licensee failed to provide important information necessary to obtain a client's informed consent, to include "any discussion of risks and benefits, or particular treatment approaches" with one exception—that Licensee did include in his form the following statements: "You have the right not to allow the use of any therapy techniques[.]" and then "[I]f I plan to use any unusual technique I will tell you and discuss the benefits and risks." (Test. of Sorenson at 303) Licensee's failure to address the use of touch in his informed consent documents (which may be annotated as needed during the course of treatment) or to address this in his chart notes indicates that Licensee failed to obtain SM's informed consent. The Board concludes that the use of touch remains a developing form of treatment that requires a clinician to obtain informed consent and documenting that in the chart. (Test. of Sorenson at 284, A29)

The evidence shows that informed consent is a process rather than an event. In his Proposed Order, the ALJ stated that although there was some indication that the Board believed

[12] Dr. Zur criticized Licensee for not having a termination of services note in the file, but that is not an issue in this proceeding.

the initial documents should address all of the risks of treatment, it would not be logically possible to identify all risks of treatment before the doctor had a chance to evaluate the client. The ALJ concluded that Licensee provided complete documentation to SM, and even SM admits that Licensee discussed touch with her before touching her. The ALJ concluded that the Board failed to prove a violation of this ES. The Board rejects this conclusion.

It is imperative for a clinician to obtain the informed consent of the client before using touch as an intervention during therapy sessions. Licensee failed to do so, as evidenced by his failure to document that discussion in the chart. The Board recognizes that SM testified that Licensee asked her a couple of times if he could sit next to her on the couch, and recalls him asking her one time if he could put his arms around her or hug her. (Test. of SM at 126) This did not satisfy the requirements of ES 10.01 to obtain the informed consent of this client. Licensee failed to document his thought process or that he discussed the use of touch with SM. Licensee also failed to document that he considered or discussed the risks or the alternatives to the use of touch, and failed to inform this teenage client that she had the right to tell him no.

In summary, the Board rejects the ALJ's conclusions of law that the evidence fails to show that Licensee violated any of the ESs, and concludes that the evidence does support a finding that Licensee engaged in unprofessional conduct in regard to his 2003 treatment of SM.

The Complaint in regard to SC. The complaint in regard to SC was filed by SC's father without her participation, and the most important fact in the case is that records of Licensee's treatment are not available for review in this case. SC has steadfastly refused to participate, and believes that her father's ongoing complaint is "emotional revenge" on his part. (Ex. L3)

The evidence in this case consists of the three notes from Licensee to SC. The Board's counsel argued that the familiar tone of the notes is a "per se" violation of ES 3.04, and that Licensee stepped from his professional role to a personal one when writing them, thereby creating a dual relationship and violating ES 3.05. Finally, the Board alleges a violation of Informed Consent, because the documents provided to SC were allegedly the same as those provided to SM. However, without SC's file that allegation cannot be established.

Per se Violation of 3.04. Because of the unwillingness of SC to participate in the complaint or the hearing, the three notes are entirely lacking in context. SC will not talk about them and Licensee cannot talk about them. Nevertheless, the Board contends that the very language of the notes constitutes a *per se* boundary violation. Webster's defines "per se" as follows:

> **per se** [pronunciations omitted] *adv* [L]: by, of, or in itself or oneself or themselves: as such[.]

Webster's Third New International Dictionary, at 1685 (2002 ed.) From the plain meaning of this phrase, the ALJ concluded that the Board believes the mere sending of the notes, without

any additional evidence, establishes a violation of ES 3.04.[13] The ALJ disagreed with the Board.

The experts on both sides have testified that context is the key to determining whether an act violates the ESs. Dr. Zur has testified that he often sends notes to clients signed "Love, OZ." Again, the context is what is important.

In this case, there is no context because there is no evidence. The Board cannot establish how the notes were received (other than SC's comments to the investigator, which would suggest they were received in a positive light), nor does the evidence establish the context of the notes in Licensee's treatment of SC. Without evidence, the Board cannot prove its case.

What little evidence there is from SC (the comment to Licensee's investigator), indicates she thought that one of the notes was one of the kindest things anyone has ever done for her. However, there is not even any context for that statement. The Board has failed to prove a violation of ES 3.04.

The Board does not find the testimony of Dr. Zur on this point to be persuasive. Dr. Zur acknowledged sending notes to his own clients, signed "Love, Zur" and that he had a number of clients misinterpret such notes, causing him to have "to correct" the misunderstanding. (Test. of Zur at 486) Clinicians are expected to avoid harm. Sending personal notes to a client using the term "Love" and the clinician's first name is fraught with peril and risks misinterpretation by the client. The Board cautions against such a practice. Clinician's must remember that there is a disparity of power between themselves and their clients. This is particularly true with a teenaged client who may perceive their clinician as assuming a parental role in their lives. But in this case, in view of SC's statement, the Board concludes there is a lack of evidence to find a violation in regard to SC.

Multiple Relationships Violation. The Board again argued, as it did in SM's case, that Licensee was going from his professional role to a personal one when he sent the notes to SC, thereby creating a dual relationship. However, for the reasons just discussed, the ALJ noted that the Board is speculating about what Licensee was doing when he sent the notes to SC. Speculation is not proof. The Board adopts this conclusion by the ALJ.

Informed Consent. The Notice raised the issue of informed consent concerning the documents provided to SM in 2003, and added a second count concerning the documents given to SC in 2007. The ALJ found no violation of Informed Consent in SC's case. The Board adopts that conclusion.

Sanctions. The proposed order found that the Board failed to prove any violations by Licensee, and therefore, there would be no basis to apply the sanctions recommended by the Board and that the Notice should be reversed. The Board does not agree in regard to SM, but does not find violations in regard to SC. Therefore, the Board concludes that the proposed sanction originally proposed by the Board of suspension for one year, to restrict him from seeing

[13] The ALJ assumed that the Board is not arguing a concept similar to "negligence *per se*," in which the phrase refers to a violation of statute or rule. It has cited no specific rule or statute that would make the sending of a note a violation of a statute or rule, and the evidence from experts on both sides agrees that context is essential to understanding what is, and what is not, a boundary violation.

female clients that are 25 years or younger, and to impose a $5,000 fine is too severe. Licensee's ethical violations did not constitute "grooming" behavior. The Board, therefore, is prepared to impose the following sanctions and conditions on his license, to include reprimand, that Licensee must successfully complete coursework pre-approved by the Board's designee on informed consent, charting, and the use of touch during therapy, and that Licensee must practice for a minimum of one year under the supervision of a licensed psychologist pre-approved by the Board's designee, with monthly written reports provided to the Board.

EXCEPTIONS

On June 15, 2012, Licensee through his counsel indicated that he would be filing objections to the Board's Amended Proposed Final Order, and requested an extension of 45 days to file exceptions. On June 19, 2012, the Board informed Licensee's counsel that his request for an extension to file written exceptions with the Board with regard to the Amended Proposed Final Order until August 6, 2012 was granted. Licensee's written exceptions were postmarked on August 6, 2012, and are considered to have been timely submitted.

In his written exceptions, Licensee alleges that the Board's investigator, Karen Berry, has engaged in "unrelenting misconduct throughout the investigation, revealing confidential information, making false representations in order to obtain confidential information, and manipulating witnesses through interview tactics known to cause memory destruction and degradation."

Licensee engaged in this type of rhetoric during the investigation, the hearing, and now, in the exceptions process. Licensee obviously disagrees with the decision of this Board to reopen the investigation in regard to SM after it had received a complaint concerning Licensee's conduct in regard to SC. And he also disagrees with the manner of questioning employed by the Board's investigator of various witnesses. The investigative style of the Board's investigator is not germane to the investigation regarding SC because the Board's case focused on the actual notes sent by Licensee to SC, and not on the therapy itself. Licensee also argues that the investigator engaged in improper questioning of DC. After receiving a complaint and conducting an investigation, the Board closed the investigation in regard to DC. The Board finds, therefore, that the testimony of DC is not relevant to the allegations regarding either SC or SM. (*See* 627 – 628)

Licensee alleges that the investigator disclosed confidential information during the course of the investigation. The Board does not find this allegation relevant to the allegations pertaining to either SM or SC. Furthermore, to the extent that the Board's investigator may have disclosed information obtained in the course of an investigation with witnesses that she interviewed, such disclosures may be made to the extent necessary to conduct a full and proper investigation. ORS 676.175(1)

Licensee also argues that the Board erred by not accepting as a historical finding of fact the assertion that the Board's investigator made a false representation to Wernecke in regard to the status of the release signed by SC's father. Licensee argues that Karen Berry attempted to mislead Wernecke into believing that she had a valid release signed by SC. In her testimony,

Wernecke testified that when she spoke to Karen Berry over the phone, Ms. Berry told her that she had sent Wernecke a signed release of information regarding SC. (Test. of Wernecke at 647) Ms. Berry testified that she informed Ms. Wernecke that she had a release signed by SC's father and that she had sent Wernecke a copy of that signed release prior to speaking with Ms. Wernecke on the phone. (Test. by Berry at 621) At the hearing, Wernecke testified that she could not recall whether Karen Berry specifically told her that the release was signed by SC's father and not by SC. The Board concludes that Karen Berry did not try to mislead this witness. Karen Berry sent Ms. Wernecke a copy of the release signed by SC's father prior to calling her, and referred to that release during their phone conversation. Furthermore, the factual issue that Licensee attempts to create is not material or relevant in regard to the notes that Licensee sent to SC.

Licensee also argues that the Board was not entitled to SC's confidential health information and objects to the Board's finding that SC refused to participate in the complaint or sign a release. The Board based this finding upon the testimony of its investigator that she had called and left a message with SC on two occasions, and received no response. (Test. of Berry at 377) The Board notes that SC spoke with the defense counsel's investigator, and told her that she resented that a complaint had been filed against Licensee and recalled that she received a call when she was living in Eugene about the case, but did not return the call. (L3 at 2) The Board stands on its finding of fact.

In his exceptions, Licensee takes issue with the Board's modification of the ALJ's discussion of the post-hearing motion that the Board's investigation was "probably overreaching." Licensee argues that the Board's modification is not supported by clear and convincing evidence. The Board rejects Licensee's statement that this statement by the ALJ constitutes a historical finding of fact. The context of this comment is in regard to Licensee's effort to apply the doctrine of laches in regard to the case involving SM. The ALJ properly denied that motion, and then made his assertion about "probably overreaching" without further explanation. The Board made the decision to reopen the investigation in regard to SM after receiving a complaint in regard to SC. The Board directed its investigator to contact SM. (A36 at 2) Such a decision falls within the Board's discretion to conduct investigations. ORS 675.110(8)

Licensee also takes issue with the Board's decision to change the ALJ's finding that the evidence in regard to SM was stale. This observation by the ALJ is not a historical finding of fact because it does not concern whether an event did or did not occur in the past or whether a circumstance or status did or did not exist either before or at the hearing. ORS 183.650(3) The basis for the Board's finding that the evidence in regard to SM is not stale includes the following:

- SM was not willing to discuss the case with the Board's investigator in 2003 because Licensee (who had been her deceased father's therapist) was providing therapy to her step mother who was going through a difficult time in her life and Licensee appeared to be helping her. SM "...didn't want to get in the way of her treatment." (Test. of SM at 132)
- After she was contacted in 2010, she was willing to meet with the Board's investigator

and signed a release at that time. (Test. of SM at 133)

- SM testified at the hearing in regard to the sessions and contacts she had with Licensee in 2003.
- SM's mother testified that in 2003 she began to notice that SM started cancelling sessions. One night while they were out at dinner, SM began to talk to her mother about her sessions with Licensee. SM told her mother that she was starting to feel uncomfortable with the sessions and some of the behavior that was going on. (Test. at 71)
- SM's mother discussed this matter with her therapist, Lisa Maas, Ph.D., on September 23, 2003. Lisa Maas's chart note on that date reflects that SM's mother told her Licensee would sit beside her on a couch, place his arms around her, and massage her neck. Licensee encouraged SM not to go to college and asked "Are you going to miss me?" Licensee kissed her on the cheek. He also called her at college and insisted on seeing her twice a week. (A16, 2 & 3) This report was very concerning to Lisa Maas, she felt that Licensee had violated professional boundaries with SM and encouraged SM's mother to report it to the "ethics board." (Test. of Maas at 266)
- SM's mother reported her concerns to the Board in 2003. (*See* A1)
- Licensee's 2003 chart notes for SM are part of the record. These notes reflect that Licensee saw SM for therapy on 8/4/03, 8/12/03, 8/18/03, 8/20/03, 8/26/03, 9/15/03, and 9/19/03. Licensee chart notes recorded during these sessions contain detailed information to include a statement that SM wanted two sessions a week and that Licensee discussed with SM whether she was ready to go to college. (A24 at 9) He also charted that SM "will need to call & do phone sessions & come to PDX when she can." (A24 at 10) He also wrote "Discuss how to stay connected in school. Follow up w/planning." (A24 at 10) Licensee's redacted schedule reflects the time for each of these sessions. (A25)
- SM's journal for the summer of 2003 is also part of the record. These journal entries record SM's present sense impressions of Licensee that were recorded at the time. SM's first impression of Licensee was her very positive. She journaled on 8/7/03 that she "really liked him" and that "He's really nice & sensitive, but at the same time told me not to b***s*** him." The last entry that referred to Licensee was recorded on 9/27/03, when she wrote that Licensee "was way too creepy for me. He was hugging me a lot & kissing me on the cheek & just a lot of weird stuff." (A37)

Licensee contends that the evidence was not sufficiently preserved to allow adequate investigation and that the "staleness was caused by the Board's failure to notify Licensee when the complaint arose, prohibiting Licensee from recording details of his treatment for the purposes of the complaint." Licensee also argues that the reliability of the testimony of SM's mother and SM is "severely flawed" by the passage of seven years. The Board acknowledges that the Board of 2003 failed to notify Licensee about the complaint in 2003, or that the case was closed. But this did not affect Licensee's duty to compile chart notes contemporaneous with the therapy sessions, and Licensee did so. Licensee's knowledge, or lack of knowledge, of a complaint against him did not affect his obligation to chart his treatment sessions with SM. And the passage of time did not affect SM's present sense impressions of Licensee's conduct that she related to her mother in 2003, or her impressions about Licensee that she recorded in her journal. Neither did the passage of time affect what SM's mother informed her therapist, Lisa Maas in 2003, or what she reported to the Board in 2003. The Board finds that the evidence in regard to SM's case is not stale by a preponderance of the evidence. While it is possible to point out

differences between the testimony of SM at hearing and what she told her mother or related to Karen Berry during the 2010 investigative interview (*see* A13 & 14), there is no question that Licensee sat next to SM, that he purposefully and repeatedly touched her during the course of her therapy sessions with Licensee, that Licensee kissed SM one time on the cheek, and that SM felt

very uncomfortable and violated by the physical contact that she was subjected to. (Test. of SM 130 – 133) Even assuming that the Board's finding on the issue of staleness arises to the level of a historical fact, the Board is convinced by the higher standard of clear and convincing evidence that the evidence pertaining to Licensee's conduct in regard to SM is not stale.

Licensee also objects to the Board's amendment to the ALJ's proposed order finding SM more credible than Licensee. In the proposed order, the ALJ commented that the Board accused Licensee of engaging in "sexual solicitation" and unwelcome touching. The ALJ noted that Licensee did not remember the sessions, but that he testified that he would not touch or sit next to a client without first asking permission. SM testified during her direct examination that she recalled Licensee asking her maybe a couple of times, but not every time, if he could sit next to her on the couch. (Test. of SM at 126) She reiterated this during cross examination (Test. of SM 236-240) She also testified that she felt at the time that she was not allowed to say no to Licensee due to her young age. The ALJ stated that he had some concerns about SM's testimony and her recollection after so many years, and the ALJ cited as an example that "she testified that she felt uncomfortable from the very first meeting with Licensee because of the touch issues." And yet, a review of SM's direct examination reveals the following testimony from SM in regard to a question about her first session with Licensee: "I think the first session I was—I liked that he was kind and I think that it went well. I didn't have any concerns at that time. I thought that he was comforting." (Test. of SM at 121) She reiterated later in her testimony that she felt that the first session was "very comforting." (Test. of SM at 125) And during cross-examination she denied being uncomfortable during her first session with Licensee. (Test. of SM at 241) This testimony was consistent with SM's journal entry on August 7, 2003 (SM's first session was on August 4, 2003, A25 at 19) SM testified at the hearing that during subsequent sessions, Licensee made her feel uncomfortable by putting "his arm around me while I was crying, try to console me, rub my shoulders while his arm was around me. He would walk out with—at the end of the session he would give me a hug and then walk out with his hands on my hips standing behind me...." (Test. of SM at 125) The ALJ also commented in his proposed order on SM's journal entry of August 15th, in that she did not mention Licensee at all. But the context of that journal entry is revealing—SM wrote that journal entry while on a camping trip to Mt. Adams, where she was fly fishing with her brother, and reminiscing about how her deceased father was the "heart and soul" of this particular camping trip. The next journal entry is September 27, 2003, and it is in this entry that SM records that she no longer has a counselor and that Licensee "was way too creepy for me." (A37)

Licensee in his exceptions refers to the ALJ's finding that he did not accept SM's testimony that Licensee placed his hands on her hips to guide her out of the office on every visit as being implausible. The Board has rejected this finding by the ALJ. The Board based this finding on the following evidence:

- During her interview with Karen Berry in 2010, SM's mother recalled SM telling her that at the end of each session, Licensee would open the door for SM and then from

behind place his hands on her hips and would guide her through the doorway. (A13, at 1)

- SM's mother testified at hearing that SM told her that Licensee would open the door and place his hands on her hips and "sort of escort her out." (Test. at 73)

- During her interview with Karen Berry on January 20, 2010, SM stated that Licensee would hug her at the end of every session after she got up to leave. "Then he would put hands on her hips from behind and guide her through the doorway." A14, at 1)
- SM testified at hearing that at the end of each session, Licensee would give her a hug and "walk me out with his hands on my hips standing behind me...." (Test. at 125)

The fact that Licensee's office opened into a common hallway shared by other practitioners and that his conduct could be observed by others does not render the report by SM implausible. The Board gives credence to the testimony of SM, noting that she recorded her discomfort with Licensee in her journal in 2003, and she reported her discomfort to her mother at that time. Her detailed recollection in 2010 and during the hearing in 2011 was consistent and reflects a lack of boundary awareness by Licensee in his interactions with SM.

In his exceptions, Licensee relies upon the ALJ's statement that the evidence was in conflict in regard to Licensee's kiss on SM's cheek. SM testified that during her last session, she felt like she was "leaving a relationship" and pulled away when Licensee tried to kiss her, she "turned my cheek and he kissed me on the cheek." (Test. at 130) This is consistent with what SM recounted to Karen Berry during her interview on January 29, 2010. (A14 at 2.) SM reported that kiss to her mother in 2003, who in turn reported the kiss to her therapist, Lisa Maas. (A16) SM recorded in her journal about being kissed by Licensee on September 27, 2003. (A37) The evidence that Licensee kissed SM and that the kiss was unwelcome is overwhelming.

In his exceptions, Licensee asserts that SM's credibility was lacking in her testimony concerning having cancelled sessions with Licensee, who suggested having two sessions per week, and whether Licensee called SM at college. Licensee acknowledges that his records reflect one cancelled session, but of course, Licensee does not recall any of the sessions he had with SM. Neither is there a way to determine if Licensee faithfully charted calls from SM to cancel a session. SM's mother testified that she noticed that SM started cancelling sessions with Licensee. (Test. at 71) This type of discrepancy is not significant. In regard to the cancelled sessions, Licensee did chart that SM "wants 2 sessions a week" (A24 at 9), but SM testified that it was Licensee who suggested two sessions a week, and she agreed. (Test. at 155) This conflict between SM and Licensee is also not significant, and may just reflect a difference in perspective between the two persons. In regard to Licensee placing calls to SM at college, Licensee did chart that SM needed to call him while at college to do phone sessions. (A24 at 10) During his testimony, Licensee acknowledged that although he did not remember, he was sure that he would call such a client and recalled that SM's mother called him and left a message telling him to please not call SM anymore. (Test. at 50-51) This evidence corroborates SM's testimony that Licensee called her at college, the only question is how often did he call her, and did he call her on the dorm phone or her cell phone. These points, raised by Licensee in his exceptions, do not diminish SM's credibility.

Licensee relies upon the ALJ's finding to argue that the evidence is in conflict about whether Licensee is a sexual predator, or was he "really good" and "straight forward" as SM recorded in her journal in 2003? Licensee then notes that while he did not remember his treatment of SM, he categorically denied that he ever kissed her or put his hands on the hips of a client. Licensee relies upon the ALJ's finding that: "Both witnesses testified generally credibly, although I doubt SM's 2010 recollection that Licensee grabbed her hips. The evidence is, at best, inconclusive either way." The ALJ found that the Board did not carry its burden to establish that Licensee's conduct constituted sexual harassment in regard to SM.

Licensee's argument and the ALJ's finding rely upon the fallacy of the false dilemma. The issue is not whether Licensee is a sexual predator or a fine upstanding member of the profession. The question is whether Licensee's conduct constitutes sexual harassment. The definition of sexual harassment includes sexual solicitation, but also includes both verbal and nonverbal conduct that is sexual in nature, that occurs in connection with the psychologist's activities, and is unwelcome, offensive, or creates a hostile environment and the psychologist either knows this or is told that the conduct is sufficiently severe or intense to be abusive to a reasonable person in this context. It is beyond dispute that Licensee's conduct with SM occurred in connection with his treatment sessions with her. The issue is whether his conduct, to include sitting next to her, placing his arm around her, massaging her neck and shoulders, hugging her at the end of sessions, placing his hands on her hips to guide her out of the office and giving her a kiss at the end of the last session was conduct that rises to the level of sexual harassment. Based upon the evidence of record, the Board does not believe that Licensee is a sexual predator. But the Board is convinced that Licensee has a poor understanding of professional boundaries, and does not recognize that he has engaged in behavior that was unwelcome and offensive to SM. Furthermore, Licensee's behavior was sufficiently severe or intense to be abusive to a reasonable person in this context, particularly in view of SM's life situation at the time—who was 18 at this time, was a recent cancer survivor, was balancing her relationship with her mother and her step mother (her parents had divorced and her father had remarried), was dealing with the unexpected death of her father just a few months prior to her sessions with Licensee, and was planning to go to Evergreen College in the fall for her freshman year of college.

In his exceptions, Licensee takes issue with the Board's credibility finding in regard to SM's mother and her therapist. He argues that clear and convincing evidence does not exist in the record to show that the ALJ was wrong to disregard their testimony, and contends that their testimony was hearsay, and that SM's mother was biased against Licensee. Hearsay is admissible in administrative hearings, so that part of Licensee's argument lacks merit. But the Board does not accept Licensee's premise that all of this evidence was hearsay—the chart notes of Lisa Maas, the therapist of SM's mother, (A16) would qualify as an exception to the hearsay rule. And while SM's mother did not like the idea of SM leaving her current therapist at the time and going to see Licensee (Test. of SM's mother at 85), there is no evidence to show that she had a personal bias against Licensee. The Board is convinced by clear and convincing evidence that the testimony of SM's mother and her therapist is credible and deserving of significant weight.

Even though the Board did not find a violation against Licensee in regard to his conduct towards SC, nevertheless, he takes issue in his exceptions with the Board's finding that Licensee's decision to send a personal note to a teenage girl signed "Love, David" might be

confusing and misunderstood in terms of the nature, the intensity of the relationship and its general meaning.

The Board is charged by statute with the mission to enforce the code of ethics in regard to psychologists licensed to practice in this state and to exercise general supervision over the practice of psychology in this state. Contrary to the views of Licensee, the Board did not find Dr. Zur's testimony to be convincing and was not surprised to learn that he had clients who had misunderstood personal notes that he had sent. The Board would caution any practitioner to be very cautious about sending personal notes to clients and to give careful thought as to how to sign such a note, and to have a professional rationale for doing so.

Licensee also objects to the Board's finding that he violated ES. 2.01, Boundaries of Competence. In his exceptions, Licensee relies upon the distinction set forth in the ALJ's proposed order "between therapeutic touch (the use of touch as a conscious tool to treat client complaints), and the use of touch in general (handshakes, appropriate hugs, etc.)" Licensee asserts that the Board misunderstood the testimony of Dr. Sorenson, and that he made no reference to charting during his testimony at 281-284. He also argues that Dr. Sorenson's recommendation to provide written information on the use of therapeutic touch as a means to obtain informed consent is not a mandate to require that all instances of touch be noted in a patient's chart.

The Board does not find these exceptions to be well founded. The context for the questions directed to Dr. Sorenson at the pages referred to were calling his attention to an article published by the American Psychological Association entitled: "Use of Physical Touch in the "Talking Cure": A Journey to the Outskirts of "Psychotherapy" (A29) The questions posed to Dr. Sorenson asked him to comment on specific portions of that article, to include that commentary that the decision to use touch by therapists must be deliberate, designed to benefit the client, and evaluated to see if it was beneficial. The article stated, and Dr. Sorenson agreed, that touch "that exceeds a simple handshake should only be used if a strong therapeutic alliance has already been established. In addition, it is important to monitor the client's reactions (both verbal and non-verbal) to being touched by the therapist, and the subjective meaning the experience holds for the client should be explored." (Test. at 282, A29 at 11) The article went on to state that the clinician can implement additional safeguards to minimize risk of exploitation and harm, and that from the standpoint of risk management, "it would be wise to obtain the client's formal informed consent before using touch, followed by clear documentation of the actual interventions in the treatment record." (A29 at 11) It was in this context that Dr. Sorenson testified that it is important to obtain the client's informed consent before using touch. (Test. at 284) The Board affirms its findings, but wants to clarify that it is not stating that a clinician must chart every instance of casual touch during therapy. The Board's findings in this matter are predicated on the conclusion that Licensee engaged in more than casual touch. The Board has found that Licensee purposefully and repeatedly sat next to SM, put his arm around her to comfort her on repeated occasions during therapy sessions, hugged her at the end of sessions, placed his hands on her hips to guide her out of the office, and gave her a kiss on the cheek at the end of the last session. Although SM recalled Licensee asking her on at least two occasions if he could place his arm around her while he was doing it, SM did not feel like she had permission to say no, and acquiesced on those occasions. This Board views such conduct as going beyond the

use of "general touch." Licensee's insistence that he was not using touch as a treatment modality during his sessions with SM is not persuasive. The Board is not creating a new standard, but is enforcing an existing standard that is well supported by the professional literature.

Licensee's exceptions take issue with the Board's modification of the ALJ's proposed order that Licensee failed to avoid harm (ES 3.04) He argues that there is no requirement for a psychologist to chart or to obtain the prior consent of a client in regard to the use of general touch. Licensee's argument is based on a false premise. The Board has found that Licensee's conduct with SM went well beyond what could be characterized as general touch. SM testified that during some of the sessions, Licensee would ask if it would be okay to sit next to her and put his arm around her, and on other occasions he did not. (Test. of SM at 237-240) But SM also testified that on those occasions, he would ask as he was sitting next to her or placing his arm around her, and she did not feel that she had permission to tell him no. (Test. of SM at 126) And SM testified that she felt that Licensee was an authority figure to her, and recalled that on one occasion when Licensee asked while he was placing his arm around her if it was okay, she did not answer, "and he seemed put off by that." (Test. of SM at 126)

Licensee argues that SM gave no indication whatsoever as to how Licensee should have or could have perceived her discomfort. But the burden is not on the client to express discomfort to the clinician. The obligation is upon the clinician to first establish a strong therapeutic alliance with the client, and then to ask the client for permission to touch and to clearly state that the client has the right to say no. (*See* A29 at 11) The clinician must then assess the client's reaction, looking for both verbal and non-verbal cues. Licensee failed to do this, and therefore failed to avoid harm in regard to SM. As a result, SM felt uncomfortable during her second and successive sessions with Licensee, and testified that "she will never see a male counselor again." (Test. of SM at 133)

Licensee's exceptions also take issue with the Board's findings in regard to Licensee's failure to obtain SM's informed consent to therapy. (ES 10.1) Licensee bases his argument upon the testimony of Dr. Zur and the premise that Licensee only engaged in general touch, and therefore, had no obligation to chart the use of touch or to obtain SM's informed consent. The Board's conclusion of law is predicated upon its factual finding that Licensee's use of touch went well beyond what could be characterized as general touch. The Board will not disturb its conclusion that Licensee failed to carry out his obligation to obtain SM's informed consent before using touch as an intervention during therapy.

In his exceptions, Licensee renews his assertion of laches, arguing that the Board delayed an unreasonable amount of time in its investigation, was in possession of all relevant facts in 2003 in regard to SM, and that Licensee was substantially prejudiced by the Board's unreasonable delay. It is well established that laches is inapplicable in a proceeding in which the government seeks to enforce a public right or public interest. *City of Mosier v. Hood River Sand, Gravel & Ready-mix, Inc.*, 206 Or App 292 (2005); *Corvallis Sand &Gravel Co. v. Land Board,* 250 Or 319 (1968) *See also Spray v. Board of Medical Examiners*, 50 Or. App. 311, at 326 (1981) ("we note that there is no statutory authority that a proceeding to revoke a medical license be brought within a certain amount of time.") Laches and the lapse of time do not bar board

disciplinary action.

In addition, the Board does not agree that it was in possession of all the relevant facts in 2003. At that time, SM refused to be interviewed and did not sign a release form in regard to her records. Although the Board had information from SM's mother (and therapist), SM refused to communicate with the Board or to sign a release. (*See* A1) After the Board received a complaint in 2009 about Licensee's conduct toward another female teenager (SC) the Board directed its investigator to conduct SM and her mother. It was at this time that SM decided to speak with the Board's investigator, answer her questions, and to sign a release. The Board concludes that it did not unreasonably delay this investigation, and that Licensee did not suffer substantial prejudice by the passage of time. The key witnesses were available to testify, his chart notes were preserved, and he had the opportunity to prepare his defense and to confront the Board's witnesses during the hearing.

Licensee's concluding exceptions attack the character and conduct of the Board's investigator. Licensee now alleges for the first time in his exceptions that SM's diary, which was presented as evidence in rebuttal by the Board's counsel at the hearing, was not "just discovered" and was part of "an on-going pattern of obfuscation by the Board's investigator." The record does not support Licensee's assertions. The Board's counsel established through his offer of proof at the hearing that SM called his office after the first day of hearing and informed his paralegal that she recalled having written a journal in 2003, had located it, and asked if it would be helpful. She was asked to send the journal by FedEx to his office, and she did so. That journal was offered and received into evidence after the ALJ overruled Licensee's hearsay objection. (Record at 677-679) The Board views Licensee's remaining remarks in regard to its investigator, such as whether she referred to "several young women" as immaterial, and hardly the basis to assert that she was engaging in dishonest and deceitful conduct. Licensee's remaining exceptions and arguments are without merit.

ORDER

The Board of Psychologist Examiners issues the following order:

Licensee is reprimanded. Licensee must successfully complete coursework pre-approved by the Board's designee on informed consent, charting, and the use of touch during therapy. In addition, Licensee must practice for a minimum of one year under the supervision of a licensed psychologist pre-approved by the Board's designee, with monthly written reports provided to the Board. During this time, Licensee must revise his informed consent form with the assistance and approval of his supervisor, and submit his revised informed consent form to the Board for review and comment. At the end of one year, Licensee may, with the written endorsement of the supervisor, submit a written request to terminate the requirement to practice under supervision.

Redacted

Shane Haydon, Ph.D.
Board Chair

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 et seq.

BEFORE THE

BOARD OF PSYCHOLOGIST EXAMINERS

STATE OF OREGON

In the Matter of the License to Practice as a Psychologist of:	)	AGENCY NO: OBPE #2009-035 & #2010-007
DAVID T. BICE, Ph.D.	)	NOTICE OF PROPOSED LICENSE SUSPENSION & RESTRICTION

The Board of Psychologist Examiners (Board) is the state agency responsible for licensing and disciplining psychologists, and for regulating the practice of psychology in the State of Oregon. David T. Bice, Ph.D. (Licensee) is licensed by the Board to practice psychology in the State of Oregon.

1.

The Board proposes to suspend the license of Licensee to practice psychology for one year, to impose terms of probation that restrict him from seeing female clients that are 25 years old or younger, and to impose a $5,000 fine.

2.

The Board's proposal to suspend the license of Licensee based on the following alleged facts that constitute violations of ORS 675.070 and ethical principles:

2.1 Client A, a 17 year old female and college freshman initially met with Licensee on August 4, 2003 to address issues related to the unexpected death of her father and having survived a life threatening disease. During the second session, Licensee informed Client A that his therapeutic method was more personal and somewhat physical and that she might not want to discuss it with others because they might not understand his methods. During the course of seven sessions between August, 4, 2003 and September 19, 2003, Licensee would sit in close proximity to Client A, resulting in intermittent physical contact. During these

sessions, Licensee would occasionally put his arm around Client A and keep it there. On one occasion, Licensee rubbed Client A's neck and shoulders while sitting on the couch next to her and told her that she needed to "loosen up." Licensee noted in the chart that Client A used to receive a lot of appropriate and affirming touch from her father, but upon his death, "she is not touched by anyone. It is like a kinesthetic vacuum." Licensee informed Client A that it was important for her to receive touch after her father's death. Licensee hugged Client A during some of the sessions and hugged her at the end of each session as she got up to leave. Then Licensee would put his hands on her hips from behind and guide her through the doorway. Licensee informed Client A to call him after she began to attend classes at her out of state college so that they could do sessions over the telephone and to come to Portland for sessions when she can. Client A did not act on this suggestion. At the end of the last session on September 19th, Licensee hugged Client A and attempted to kiss her on the lips. She turned her head away and was kissed on the cheek. She left. Client A did not have any subsequent contact with Licensee. Licensee subsequently attempted to make telephonic contact with Client A at her college, but discontinued to make calls after Client A's mother told him to stop. Licensee's conduct in regard to Client A violated ORS 675.070(2)(d) (unprofessional conduct); Ethical Principle (EP) 2.01, Boundaries of Competence; 3.02 Sexual Harassment; 3.04 Avoiding Harm; EP 3.05 Multiple Relationships; and EP 10.01 Informed Consent to Therapy.

2.2 Licensee had Client A sign a form, dated August 4, 2003, acknowledging that Licensee may use or disclose her protected health information for treatment, payment and healthcare operations. Within the body of this form, it also stated that "I hereby consent to treatment by Dr. David Bice under the conditions listed

in the Notice of Privacy Practices." When asked by the Board to provide a copy of his informed consent form for treatment, this is the document that Licensee provided to the Board, but without the Notice of Privacy Practices. Licensee failed to obtain informed consent from Client A for the treatment that he provided her, to include failing to inform her that his method of treatment is not a generally recognized technique, the potential risks involved with his method of treatment, the alternative treatments that may be available and the voluntary nature of her participation, in violation of EP 10.01, Informed Consent to Therapy. Licensee relied upon the same form to obtain the informed consent of Client B, in violation of EP 10.01, Informed Consent to Therapy.

2.3 Licensee began to meet with Client B, a female high school student, for therapy in April of 2007. Licensee sent a personal card to Client B, dated August 15, 2007, telling her: "I just want you to know that I am glad you are here on this planet..." and "I want to wish you the best of birthdays!", and signing the card "Sincerely, David Bice." Licensee sent her a commercial greeting card in August 2008 wishing her a happy birthday with a personal handwritten note that Licensee signed "Love, David." Licensee sent a card to Client B on about June 5, 2009, congratulating her on her graduation from high school, in which he wrote: "This card doesn't say nearly enough about who you are and who you are becoming. But, I've told you before what I think and feel about all the changes you've made. All of that still stands. I wish you the best on your path. David Bice." Licensee's conduct violated EP 2.01, Boundaries of Competence; 3.04 Avoiding Harm; and EP 3.05 Multiple Relationships.

3.

The Board has authority to suspend and to impose other sanctions and terms of probation upon Licensee's license to practice psychology in Oregon pursuant to ORS 675.070(1); ORS

675.110(3), (4) (5) and (12); and OAR 858-010-0075(1). The Board has authority to investigate complaints under ORS 675.110(8). The Board reserves the right to amend this Notice and impose additional sanctions as allowed under the Board's authority.

4.

Licensee has the right, if Licensee requests, to have a formal contested case hearing before an Administrative Law Judge to contest the matter set out above, as provided by Oregon Revised Statutes 183.310 to 183.550. At the hearing, Licensee may be represented by an attorney and subpoena and cross-examine witnesses.

5.

If Licensee requests a hearing, the request must be made in writing to the Board, must be received by the Board within thirty (30) days from the mailing of this notice, and must be accompanied by a written answer to the charges contained in this notice. Before commencement of the hearing, Licensee will be given information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing as required under ORS 183.413-415.

6.

If Licensee fails to request a hearing within 30 days, or fails to appear at the hearing as scheduled, the Board may issue a final order by default and impose the proposed suspension against Licensee. Licensee's submissions to the Board to-date regarding the subject of this disciplinary case and all information in the Board's files relevant to the subject of this case automatically become part of the evidentiary record of this disciplinary action upon default for the purpose of proving a *prima facie* case. ORS 183.417(4).

DATED this 14 day of Sept, 2010.

BOARD OF PSYCHOLOGIST EXAMINERS
State of Oregon

Redacted

Oregon Board of Psychologist Examiners